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Supreme Court of the United States

OCTOBER TERM, 1970

No. 839

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Petitioners,

versus

DEREK JEROME SINGLETON, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the two judgments of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 5, 1970, and on August 12, 1970. Petition for rehearing of the former judgment was denied on July 13, 1970.

OPINIONS BELOW

The opinions[1] of the courts below directly preceding the petition are as follows:

[1]Earlier proceedings in the case are reported as *Evers v. Jackson Municipal Separate School Dist.*, 348 F. 2nd 729 (5th Cir. 1965); *Singleton v. Jackson Municipal Separate School Dist.*, 355 F. 2nd 865 (5th Cir. 1966); and *Singleton v. Jackson Municipal Separate School Dist.*, 419 F. 2nd 1211 (1969), rev'd in part sub nom., *Carter v. West Feliciana Parish School Bd.*, 396 U. S. 290 (1970).

1. Opinion and order of the District Court, filed on January 22, 1970, unreported (1a).

2. Opinion of the Court of Appeals, dated May 5, 1970, unreported (22a).

3. Order of the Court of Appeals on petition for rehearing dated July 13, 1970, unreported (45a).

4. Opinion and order of the District Court, filed June 15, 1970, unreported (47a).

5. Opinion of the Court of Appeals, dated August 12, 1970, unreported (72a).

JURISDICTION

The order of the Court of Appeals on petition for rehearing was entered on July 13, 1970 (45a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Upon request from the courts below, the United States Department of Health, Education and Welfare developed plans to desegregate the public schools in Jackson, Mississippi. The HEW plan for elementary schools admittedly was educationally sound while achieving a high degree of desegregation. That plan

was adopted by the District Court after a full evidentiary hearing, and neither party appealed. While considering an appeal involving secondary schools, the United States Court of Appeals for the Fifth Circuit, on its own motion, summarily rejected the elementary school plan. The case was remanded for further hearing and the formulation of an additional plan or plans with the assistance of a court appointed bi-racial committee. The bi-racial committee developed a plan based upon the original HEW plan. The bi-racial committee plan was approved by the District Court with modifications. Again, the Court of Appeals rejected the District Court approved plan because it did not produce "on paper" certain arbitrarily formulated statistical results.

The first question presented to this Court is whether the constitutional requirement of a unitary school system is to be measured by arbitrary numerical results, without regard to educational soundness and feasibility as determined by the District Court with the concurrence of HEW and the parties.

The Court of Appeals required the School District to adopt a majority to minority transfer rule and to furnish transportation to all transferring students where the same was requested. The School District has no authority to provide intra-city transportation except in very limited circumstances on a temporary basis. There has been no equal protection violation in the matter of providing intra-city transportation. The School District has never provided intra-city transportation to any students.

The second question presented to this Court is whether the School District can be required to provide transportation which it is not authorized to do by statute, when obviously there has been no discrimination.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

1. The System

The Jackson Municipal Separate School District is the largest school system in Mississippi. It serves the City of Jackson and certain contiguous areas outside the municipal limits. Total elementary school enrollment at the beginning of the 1969-70 school year was 20,959 pupils, consisting of 10,527 Negro students and 10,432 white students. Racial percentages were 50% Negro and 50% white students. The district operated 38 elementary schools.

Total elementary school enrollment for the 1970-71 school year is 16,650. There are 10,484 Negro students or 63% of the total and 6,166 white students or 37% of the total. The district is operating 37 elementary schools.

2. Summary of Proceedings in the Courts Below

This desegregation action began in 1963. Various parties have intervened in the succeeding years. The current phase of the litigation began following this Court's decisions in *Alexander v. Holmes County Board of Educ.*, 396 U.S. 19 (1969), and *Carter v. West Feliciana Parish School Bd.*, 396 U.S. 290 (1970).

On December 1, 1969, the Court of Appeals issued a mandate requiring adoption of a unitary desegregation plan. Pursuant to the mandate, the District Court requested the assistance of the Office of Education of the United States Department of Health, Education and Welfare in preparing new plans. Collection of data by the school district began on December 8, 1969 and on December 15, 1969, a team of nine HEW educators and school administrators began working on alternative plans.[2] After 22 days of concentrated study marked by close cooperation between the HEW team and school district personnel, a single elementary plan and three alternative secondary plans were devised. The HEW secondary plans, denominated Plan "A", Plan "B", and Plan "C", were based on modified geographic zoning and were filed in the District Court on January 6, 1970. The HEW staff had anticipated that the plan would be a final plan effective with the school term beginning September, 1970, and that the school district staff would have eight months to prepare for its imple-

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[2]Four members of the team, including Dr. Herbert Larry Winecoff, the leader, were from the School Desegregation Consulting Center at the University of South Carolina, established under Title IV of the Civil Rights Act of 1964. Five members were from Mississippi State University.

mentation. However, this Court within a few days[3] ordered the immediate implementation of new desegregation plans.

The District Court ordered a hearing on January 19, 1970 to consider the various plans and on that day the school district submitted modifications to both the HEW elementary plan and the HEW secondary plans. Following the two-day hearing, on January 22, 1970, the District Court entered its Order Providing for Unitary School System (1a).

The January 22, 1970, order adopted the HEW elementary plan. It recognized seven factors considered by the HEW team as preventing total desegregation of every school in the system: (1) state laws restricting transportation of students within the system; (2) size of district in relation to location of schools; (3) natural and manmade barriers restricting student mobility; (4) demographic pattern; (5) attempts to anticipate and eliminate resegregation patterns; (6) lack of compulsory attendance law; and (7) necessity of immediate implementation of the plan (3a). The order specifically noted that the lack of total desegregation in the elementary schools was the result of the limited mobility of the younger pupils and of the fact that the smaller elementary geographic zones were necessarily controlled by housing patterns. Because the HEW pupil assignments exceeded elementary school capacities in certain cases, several modifications were ordered. The order also modified the HEW secondary school

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[3] ***Carter v. West Feliciana Parish School Board, supra,*** **which was decided on January 14, 1970.**

plan. Both plans were required to be implemented on or after February 1, 1970, for the spring term.

Plaintiffs appealed, and the United States filed an *amicus curiae* memorandum in the Court of Appeals. *Neither party challenged the elementary school plan.* Plaintiffs' first brief objected to the junior-senior high school plan in light of the alternative HEW proposals, all of which they endorsed as educationally sound while achieving a greater degree of desegregation. The brief specifically stated, "Nor does the instant appeal raise any issue regarding the 5 all-Negro and 6 all-white elementary schools resulting from the HEW plan of desegregation."[4] Defendant school district's brief merely argued in support of the District Court's secondary school plan. In their reply brief, plaintiffs again did not question the HEW elementary school plan. Indeed, the concluding paragraph stated, "Rarely has this Court been confronted with HEW plans as carefully prepared as those for Jackson. . . . They should be entered in this school case."[5] A similar observation was made in the memorandum of the United States, filed on March 18, 1970:

> The Department of Health, Education and Welfare presented a plan, with various alternative options, which bears the firm imprint

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[4] *Brief for Appellants* in the Court of Appeals, p. 11, dated February 28, 1970. One of the plaintiffs' objections to the junior-senior high plan involved the Isable-Hill complex, which had served grades 1-6 and 10-12. They desired implementation of HEW Plan "B," which would change the complex to serve grades 1-5 and 9-10. This was their only complaint with regard to the elementary plan.

[5] *Reply Brief* in the Court of Appeals, p. 15-16, dated March 9, 1970.

> of careful educational judgments. The plan embodied the recommendations of HEW's educational experts on how the city of Jackson might maximize desegregation in ways both educationally sound and administratively feasible.[6]

On March 24, 1970, after the foregoing briefs had been submitted, the Clerk of the Court of Appeals directed counsel for the parties to respond to certain questions propounded by the Court. One of the questions sought comment on the effect of natural and man-made barriers as limitations on the development of plans, and counsel were instructed to agree on the number of such barriers and the extent they resulted in varying equal distance zone lines. In addition, the school district was directed to furnish enrollment figures, "including elementary schools."

The school district responded, in substance, that since the basic plans submitted at the January hearing were devised by HEW, it had no way of knowing what barriers were considered nor their effect on zone lines. It also stated that the plans adopted were not equal distance zoning plans.[7] Plaintiffs interpreted the Clerk's letter to mean that the Court of Appeals intended to review the elementary plan, and, for the first time, they expressed a vague dissatisfaction with

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[6] *Memorandum for the United States as Amicus Curiae* in the Court of Appeals, p. 6, dated March 18, 1970.

[7] *Memorandum Submitted Pursuant to Letter of Edward W. Wadsworth, Clerk, U.S. Court of Appeals for the Fifth Circuit Dated March 24, 1970,* in the Court of Appeals, p. 3, dated March 27, 1970; *Plaintiffs Response to Letter Directive of March 24, 1970,* in the Court of Appeals, p. 2, dated March 27, 1970; see footnote 4 to Court of Appeals opinion of May 5, 1970 (25a).

the number of non-integrated elementary schools. Plaintiffs conceded, however, that in order substantially to change the plan, "a much broader record at the trial court level should be developed".[8] The inquiry from the Clerk of the Court of Appeals also instructed counsel to furnish the Court copies of state statutes restricting transportation of students which were referred to in the HEW plan as preventing total desegregation of the system. Comment on the constitutionality of the statutes was requested. Both parties agreed, and stated to the Court, that the only statute conferring authority on the district for intra-city transportation was Miss. Code Ann. §6336-31 (Supp 1969). The school district's assertion that it had never furnished intra-city transportation under the statute was not controverted. Plaintiffs and defendant district agreed that there was no constitutional infirmity in the transportation statutes.[9]

On May 5, 1970, the Court of Appeals reversed the District Court order (22a). With regard to the elementary school plan, the Court first noted that projected results under the HEW plan had not been achieved. Rather than resulting in five all-white and six all-black schools, the HEW plan in fact had produced six all-white and seven all-black schools (27a). Enrollment on March 26, 1970, showed 9,217 white

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[8] *Plaintiffs Response to Letter Directive of March 24, 1970,* in the Court of Appeals, p. 13, dated March 27, 1970.

[9] *Memorandum Submitted Pursuant to Letter of Edward W. Wadsworth, Clerk, U.S. Court of Appeals for the Fifth Circuit Dated March 14, 1970,* in the Court of Appeals, p. 3, dated March 27, 1970; *Plaintiffs Response to Letter Directive of March 24, 1970,* in the Court of Appeals, p. 2, dated March 27, 1970; see footnote 4 to Court of Appeals Opinion of May 5, 1970 (25a).

students or 1,200 less than the projected figure on which the HEW elementary plan was based (40a).

While recognizing that plaintiffs did not expressly challenge the elementary plan, the Court felt its responsibility extended to "the overall workings of the system — all aspects of the elementary and secondary levels." (27a) Because "a substantial number of Negro students will receive their entire public school education in a segregated school environment" when avoidable by "readily available means," the system was not unitary (30a). The Court ordered implementation of one of the available HEW plans for the secondary level, and the District Court was instructed to initiate proceedings for a unitary elementary plan and to call for new proposals from the parties, HEW, and a bi-racial committee to be established pursuant to the Court of Appeals mandate (33a). The sole guideline furnished for the preparation of the new elementary plans was the cryptic statement: "It is evident that the factors delineated by the HEW plans as reasons for not more fully desegregating the elementary level cannot justify this continued segregation." (34a) The Court of Appeals acknowledged that the HEW planners were restricted by state law limitations on intra-city transportation but otherwise did not discuss the transportation question. As noted, the Court of Appeals ordered the establishment of a bi-racial committee and also the adoption of a majority to minority transfer rule with the provision that "all transferring students must be given transportation if they desire it." (32a, 35a).

Pursuant to the order of the Court of Appeals, HEW and the bi-racial committee filed new elementary school plans with the District Court. The bi-racial committee plan was unanimously adopted by the six Negro and six white members of the committee. The school district urged continuation of the court-imposed January 22, 1970 plan, with a minor modification, and also supported the bi-racial committee plan. Plaintiffs offered no plan, but did propose substantial modifications to the January HEW plan. The bi-racial committee plan was based on the January HEW plan and contained modifications designed to increase integration in the elementary schools.

A two-day hearing began on June 8, 1970. Dr. Herbert Larry Winecoff, who had headed the HEW team in December and January, testified that a ten member team spent three days in Jackson devising the new HEW elementary plan [Transcript of June 8, 1970, hearing, p. 34]. He admitted that lack of time prevented the formulation of a comprehensive and educationally sound plan:

> Q So that your recommendation here is based essentially upon numbers that you [were] supplied from the administrative office and this was essentially what you attempted to do was just to get numbers and put them in various school buildings, isn't this correct?
>
> A Yes, sir. [Tr. p. 92]
>
> ...
>
> Q This is the point. Basically what I'm trying to say, Dr. Winecoff, is that your examina-

tion here was limited to just the numbers and you didn't, as you said, you didn't talk to community leaders, you didn't talk to school principals, you didn't talk to anybody about the operations of the schools and so forth and you only visited the two schools.

A That's correct.

Q And by the same token you didn't check into the financing of the city or the financing of the school district or as to how it would be financed or how it would be handled, did you?

A No, sir.

Q These were problems that you didn't check into or look in to at all?

A That's correct, partly by the time pressure. [Tr. p.100]

...

Q Now, as I understand basically, Dr. Winecoff, you felt that the plan you proposed for the elementary schools back at the beginning of this semester was a unitary school system itself, isn't that correct?

A Well, we made the statement that the total comprehensive plan one through twelve we felt was, yes sir.

Q And you still do, don't you?

A Yes, sir.

Q Now, but that under this Court order you've been ordered to do something more with reference to elementary?

A That's correct.
Q And this is the way that you've approached it?
A Yes, sir. [Tr. p. 100-101]

Dr. Winecoff unequivocally testified that the new HEW elementary plan assumed the availability of intra-city transportation:

Q So that your whole plan really insofar as this particular plan now under consideration is concerned is really based upon the availability of transportation intra-city at public expense?
A Yes, sir.
Q And if that transportation were not available then I presume that this plan that you are suggesting would not be your recommended plan?
A No, the implementation would be difficult without transportation provided.
Q So essentially if you didn't have transportation you don't think this would be a good plan, do you?
A No, sir.
Q And you really wouldn't recommend it?
A No, sir. [Tr. p. 101-102]

Finally, given the unavailability of intra-city transportation, Dr. Winecoff endorsed the bi-racial committee elementary plan:

Q So that — assuming that to the philosophy of the Bi-racial Committee, or let's us assume as a hypothetical question that that is the law and this is what the Court will hold, what is your observation with reference to the recommendations of the Bi-Racial Committee?

A If intra-city transportation were not to be provided then the proposal of the Bi-racial Committee which is maximizing transportation based on our original January plan, is probably about as good an approach as possible.

Q And by maximizing you mean which maximizes integration?

A Yes, sir.

Q In other words, what you're saying as I understand it is that the Bi-racial Committee has taken the transportation that is permitted by law and has used that to maximize integration in the schools throughout this district?

A Yes, sir. [Tr. p. 103]

Plaintiffs' modification to the HEW elementary plan sought to integrate all elementary schools "by the pairing of elementary schools which are located not necessarily in the same traditionally described neighborhoods but in reasonably close proximity."[10]

In its order of June 15, 1970, the District Court found that in the absence of intra-city transportation, the

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[10] *Reply Brief* in the Court of Appeals, p. 9, dated July 18, 1970.

HEW plan, as conceded by Dr. Winecoff, was unworkable (55a). The Court also found that "the proposals of HEW as added to by plaintiffs are not educationally, administratively, economically or practically feasible." (60a) I nadopting the bi-racial committee's plan, the Court noted:

> These proposals eliminate total segregation from all of the white schools, improve the degree of mixture in most, and leave five totally black schools all in the heavily congested black community. Despite this last, these proposals will result in more integrated schools than any proposed plan before this Court. It is additionally noted that where HEW assignments would have overtaxed the capacity of 14 schools, with two additionally overtaxed under plaintiffs' proposals, under the present plan as modified by the committee and the Court the over-assignments are reduced considerably. With the addition of the majority to minority transfer policy, and the following assignment changes offered by the Court, additional unitary steps will have been taken. (62a).

Plaintiffs again appealed. They urged the Court of Appeals to reject the school district's objections to intra-city transportation and thereby to implement their plan. They strongly criticized the new HEW proposal for permitting several segregated schools to continue to exist.[11]

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[11] *Reply Brief* in the Court of Appeals, dated July 18, 1970

On August 12, 1970, the Court of Appeals held that the elementary plan was "unacceptable" because "approximately 70% of the Negro elementary students will be in all (or substantially all) Negro elementary schools." (75a). The Court, however, hastened to state, "We expressly disclaim any intimation that racial balance is the standard by which we determine the acceptability of various desegregation plans." (75a). The plan was also found wanting in that "some students will likely have an education in predominately Negro schools throughout their school life." (76a). Both the HEW plan ("a substantial improvement") and plaintiffs' modifications of the HEW plan ("an even greater improvement") were endorsed, but the Court refused to address itself to the intra-city transportation assumption upon which each rested:

> There was much discussion in the briefs that under this type of "clustering" it will be necessary for the School District to provide intra-city transportation for the plans to be effective. But we do not reach this since the changes we mandate persuade us that there is a variety of ways to improve the result. (79a).

Because "the record is inadequate," the Court did not undertake to specify "the full form" of a desegregation plan. (79a). However, "something must be done now," since "over 70% of the Negro elementary students are to remain in substantially all Negro schools during the time the case undergoes more complete exploration". (79a). The June 15, 1970, District Court plan was then ordered to be modified by the pairing

of twelve schools and the grouping or clustering of three schools. The intended "interim" result was that "the percentage of Negroes in substantially all Negro schools will be reduced from over 70% to about 20%." (80a). A District Court hearing was ordered to begin not later than September 25, 1970, to consider changes and modifications to the plan for implementation at mid-year. The Court reluctantly concluded:

> Of course, the changes that will come as a result of the modifications we now specify and from the November [September?] order now called for will cause midyear disruptions, pupil reassignments and the like. But on balance, this is less costly than a continued loss of rights of a large number of students (81a).

In anticipation of the September 25, 1970, hearing, the District Court entered an Order to Canvass Jackson Municipal Separate School District Enrollment on September 11, 1970, directing the school district, among other things, to furnish a report showing "the current racial enrollment at each school in the system." The canvass revealed the following elementary school enrollments and racial percentages as of September 18, 1970:

Total elementary enrollment	16,650
Negro elementary enrollment	10,484 or 63%
White elementary enrollment	6,166 or 37%
Number of elementary schools	37

Number of all or substantially all Negro elementary schools	9
Number of Negro elementary students attending all or virtually all Negro schools	5,190
Percentage of Negro elementary students attending all or substantially all Negro schools	49%

Subsequently, on motion of the parties, the Court of Appeals extended to October 15, 1970, the date for the hearing on a new elementary school plan.

REASONS FOR GRANTING THE WRIT

I

The Decisions Below Conflict With Rulings of This Court In That They Reject Admittedly Workable And Feasible School Plans Maximizing Desegregation Solely Because Of Failure To Achieve Certain Statistical Results

A. *This Court Has Recognized The Need For Feasible Desegregation Plans.*

This Court has consistently recognized that the disposition of desegregation cases involves a variety of local problems and is not susceptible of any fixed rule appropriate in every case. In *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) (*Brown* II), the Court stated that "[f]ull implementation of these constitutional principles may require solution of varied local school prob-

lems." Later cases have continually emphasized the multiplicity of individual considerations:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.

Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968). While implementation of desegregation plans may no longer be delayed or gradual, the workability of the plan in light of the varying problems of individual school districts nevertheless must be considered. See *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970) (Harlan, J., and White, J., concurring).

Evaluation of desegregation plans must primarily be the responsibility of the district courts, the equity powers of which are the instruments to establish unitary systems. This Court has so held:

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . It is incumbent upon the district court to weigh [the school board's] claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.

Green v. County School Board of New Kent County, supra at 439. Moreover, the Court has recently held that findings by district courts as to whether school systems are unitary, if supported by substantial evidence, can not be disturbed by courts of appeal. See *Northcross v. Board of Educ. of Memphis,* 397 U.S. 232 (1970).

The decision below not only fails to recognize that conversion of each dual system to a unitary one is a unique problem, but also effectively strips the district court of its duties and responsibilities in the conversion process and deprives the parties to the litigation of their due process right to an evidentiary hearing. The intended results of the Court of Appeals plan are not achieved, the school system is further weakened by another costly disruption, and both plaintiffs and defendants are forced to comply with a plan with which neither is satisfied.

B. *The Court of Appeals Decisions Fail to Recognize Educational, Administrative and Economic Factors.*

The elementary school plans ordered implemented by the District Court both in the January 22, 1970 (1a), and the June 15, 1970 (47a), orders were slightly modified versions of a basic HEW plan. That basic plan was prepared over a period of twenty-two days in December and January by a team of ten educators and administrators working in "close cooperation"[12]

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[12]This is plaintiffs' term. *Brief for Appellants* in the Court of Appeals, p. 5, dated March 2, 1970.

with school district officials. It is undisputed that all factors relative to the development of a sound plan were thoroughly investigated, understood, and considered. The District Court in the January order approved minor modifications requested by the school district to the HEW elementary plan to correct student assignments to certain schools in excess of capacity. Further modifications to the same basic HEW elementary plan were made by the bi-racial committee in order to increase desegregation of traditionally Negro schools and were approved by the District Court in the June order. The original educational soundness and administrative and economic feasibility of the plan, however, were not compromised.

The second HEW plan, prepared as required by the Court of Appeals opinion and order of May 5, 1970, was, at best, mere formal compliance with the order. Dr. Winecoff testified that the team spent only three days in the school district — May 27, 28, and 29[13] — and that lack of time limited development of the new plan to "numbers" and "schools", i.e., assigning the projected elementary enrollment to particular elementary schools. Most importantly, he forthrightly admitted that the new HEW plan required intra-city transportation for implementation and would not be a "good plan" without it. Absent intra-city transportation, Dr. Winecoff endorsed the bi-racial committee plan as "probably about as good an approach as possible."

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[13]Two days later, on June 1, 1970, the plan was filed in the District Court. Transcript of June 8, 1970 hearing, p. 35.

Despite the lengthy and concentrated effort of school district and HEW officials in December and January to devise a workable plan, despite the unequivocal endorsement of the plan by the HEW team leader as being "as good an approach as possible" absent intracity transportation, and despite the good faith efforts of both the school district and the District Court to comply with constitutional requirements, the Court of Appeals has twice summarily rejected the unitary plans approved by the District Court. Why? The major reason, no doubt, was that the plans did not pass the Court's objective and inflexible "percentage" test, which will be treated below. The minor reasons, never fully explained, appear to be two: "the factors delineated by the HEW plans as reasons for not more fully desegregating the elementary level cannot justify this continued segregation" and "a substantial number of Negro students will receive their entire public school education in a segregated school environment." (34a, 30a) Whether the latter objection is valid is questionable in light of the fact that the June orders of the District Court provided for HEW plans in both the elementary and the secondary schools specifically devised to prevent this very occurrence. Moreover, Dr. Winecoff, an expert in the field, termed the January HEW plan "a total comprehensive plan one through twelve."

The critical error committed by the Court of Appeals, however, was its summary dismissal of "the factors delineated by the HEW plans as reasons for not more fully desegregating the elementary level." (34a) For this statement is tantamount to saying that "the circumstances present and the options avail-

able in each instance", *Green v. County School Board of New Kent County, supra* at 439, are simply not to be considered or are of no importance where any amount of continued segregation exists. This Court has never so blandly treated "the complex problems of desegregation." *Green v. County School Board of New Kent County, supra.* Only recently, the necessity for "workable" desegregation plans has been noted by this Court. *Carter v. West Feliciana Parish School Board,* 396 U.S. 290 (1970) (Harlan, J., and White, J., concurring).

The HEW planners and school district staff who devised the elementary plan sought to accommodate the constitutional imperative of the Fourteenth Amendment to an existing school system. The ingredients of the plan were real-life students, faculty, administration, buildings, transportation, and money, all of which had to be utilized by the planners to achieve a certain result. Judgments had to be made and were made by these experts on the basis of their experience and of accepted practices of their profession. Limitations on complete desegregation of the system recognized and agreed upon by them should not be completely disregarded. This Court should reaffirm its commitment to workable and feasible desegregation.

C. *Numerical Results Are Not the Universal Answer to the Complex Problems of Desegregation and Should Not Determine the Constitutionality of Desegregation Plans.*

The May 5, 1970, opinion of the Court of Appeals set forth no meaningful criteria to guide the parties

and the District Court in their second attempt to devise a unitary plan for the elementary schools in the district. Only two imprecise restrictions were imposed: A "substantial number" of Negro students would not be allowed to receive their entire public school education in a segregated school environment and, secondly, the seven limiting factors acknowledged by HEW at the January District Court hearing could not be used to justify continued segregation. The opinion contained no statement, either express or implied, that the percentage of Negroes in all or virtually all Negro schools would determine whether the second plan was unitary.

By early August, 1970, however, the Court of Appeals had reduced to a simple numerical proposition this Court's definition of a unitary system as one "within which no person is to be effectively excluded from any school because of race or color." *Alexander v. Holmes County Board of Educ.*, 369 U.S. 19 (1969). This numeric . proposition is as follows: If the percentage of Negroes attending all or virtually all Negro schools is 25% or less, the system is unitary, so long as the segregated 25% receive an unspecified amount of desegregated education in other schools. Virtually all Negro schools were considered to be schools in which Negroes constituted 90% or more of the enrollment. See *Allen v. Board of Public Instruction of Broward County*, No. 30,032 (5th Cir., Aug. 18, 1970).

The "percentage" test was clearly applied to the second District Court plan in the Court of Appeals opinion of August 12, 1970. Since the result was that "approximately 70% of the Negro elementary students will

be in all (or substantially all) Negro elementary schools," the plan was not unitary (75a). By its six pairings and one clustering, the Court of Appeals purportedly reduced the percentage of Negroes in substantially all Negro schools "from over 70% to about 20%" and thereby created an "interim" unitary plan. (80a).

Four other cases decided by the Court of Appeals in August, 1970, reveal even more dramatically the "percentage" test in action. In *Pate v. Dade County School Board,* Nos. 29039 and 29179 (5th Cir., Aug. 12, 1970), the District Court's plan left 22 schools, containing 44% of the Negro student population, all or virtually all Negro. Finding that "many of the reasons given [traffic hazards, school capacities, individual school programs, format and curricula, walking distances, natural barriers, and grade levels] for not achieving a greater degree of desegregation ... are unacceptable,"[14] the Court of Appeals set about the task of forcing the system — containing 250,000 students — to fit the "percentage" test model. After prescribing certain pairings, groupings, and rezonings, the Court announced that its "modifications reduce the number of Negro students attending all or virtually all Negro schools from 44% to 24% of the entire Negro student population", and that "[i]mplementation of these modifications effectively desegregates the Dade County School System."[15] Appendix "C" to the opinion confirmed the Court's numerical obsession by present-

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[14]Slip opinion, p. 6.
[15]Slip opinion, p. 7.

ing in tabular form the reductions achieved by the modifications in the number of all or virtually all Negro schools, the number of Negro students attending all or virtually all Negro schools, and the percentage of Negroes attending all or virtually all Negro schools.

In *Allen v. Board of Public Instruction of Broward County*, No. 30032 (5th Cir., Aug. 18, 1970), the District Court plan left 13 all or virtually all Negro elementary schools, containing 68% of the Negro elementary school population. Terming the plan "unacceptable" because "reasonable alternatives exist",[16] the Court of Appeals utilized the pairing and clustering technique to eliminate every all or virtually all Negro elementary school.

In *Valley v. Rapides Parish School Board*, No. 30099 (5th Cir., August 25, 1970), the District Court approved plan left 7 of 24 schools all or virtually all Negro, containing 60% of all Negro students. After holding that the plan "does not substantially abolish segregation,"[17] the Court of Appeals clustered nine elementary schools into three new attendance zones having Negro student percentages of 73%, 65% and 67%. Zones devised by HEW were ordered implemented for the junior high schools, although the Negro student percentages in two schools remained 60% and 84%. A tabulation, set forth in Appendix "B" to the opinion, was again used to summarize the Court's efforts in satisfying the "percentage" test: the percentage of Negroes at-

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[16]Slip opinion, p. 9-10.
[17]Slip opinion, p. 4.

tending all or virtually all Negro schools was reduced from 60% to 9%.

Finally, in *Ross v. Eckels,* No. 30080 (5th Cir., Aug. 25, 1970), the District Court adopted an equidistant zoning plan for the entire system which resulted in 38% of the Negro students attending all or virtually all Negro schools. Because a geographic capacity zoning plan proposed by the school district "was more effective and did in fact eliminate every all Negro school and every school attended by more than 90% Negroes"[18] at the secondary level, the Court of Appeals ordered it to be implemented. The equi-distant plan, however, was termed "an improvement"[19] over the geographic plan at the elementary level, but was modified by the pairing of twelve schools. Appendix "A" to the opinion set forth the familiar tabulation of results and revealed a reduction in the percentage of Negroes attending all or virtually all Negro schools from 29% under the District Court plan to 16% under the Court of Appeals' order.

At no time, of course, has this Court even hinted that the measure of the constitutional right to equal protection of the laws is a numerical one. This Court's definition of a unitary school system is one within "which no person is to be effectively excluded from any school because of race or color." Surely the constitutional guarantee to individual students, inherent in this definition, is not fulfilled when 75% of the in-

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[18]Slip opinion, p. 17-18.
[19]Slip opinion, p. 18.

dividual Negro students attend schools in which Negroes constitute 90% or less of the enrollment. A Negro student in an 80% Negro school is no more effectively desegregated than one in a 90% Negro school. "Effective exclusion" cannot be translated into "partial inclusion."

Moreover, the "percentage" test is a highly simplified abstraction of the real world. Educational, administrative, and economic factors considered by school officials, HEW planners, and District Courts can not be quantified and are therefore wholly subordinated to numbers and percentages. Use of the technique of pairing and clustering schools to "effectively desegregate" *does not* in every case strike a balance between the necessity of more numerical desegregation and the necessity for a workable plan, despite the Court of Appeals' intimations to the contrary in *Allen v. Board of Public Instruction of Broward County,* No. 30032 (5th Cir., Aug. 18, 1970). For pairing and clustering amount to nothing more than combining schools in proximity, as shown on a map, in such a manner as to achieve, "on paper," an acceptable percentage result. The combination may or may not be educationally, administratively, or economically feasible. Its only advantage is simplicity.

The unreality of the "percentage" test is even more pronounced when actual enrollments are compared to the projected enrollments to which the "percentage" test is applied. Consider the experience in the Jackson Municipal Separate School District. The August 12, 1970, opinion of the Court of Appeals held the bi-racial

committee plan adopted by the District Court "unacceptable" because "approximately 70% of the Negro elementary students will be in all (or substantially all) Negro elementary schools."[20] (75a). By its pairings and one grouping, the opinion and order purportedly reduced the 63% figure to about 20% and thereby established a unitary plan. The projected enrollment figures used by the Court of Appeals, however, have proved to be grossly inaccurate. Total enrollment of white elementary students, as of September 18, 1970, was 6,166, rather than the projected 9,181 utilized in the Court of Appeals' plan. This 33% loss of white elementary students between May and September has resulted in 49% of all Negro elementary students attending all or virtually all Negro schools, as opposed to the "about 20%" projected by the Court of Appeals in the August 12, 1970, opinion.

If the "percentage" test continues to control the acceptability of desegregation plans, systems such as Jackson may be years away from operating a stable unitary elementary system. For this pattern is emerging: the Courts will attempt to achieve a percentage result on the basis of projected enrollments; these enrollments will be rendered inaccurate by continued loss of white students; the percentage results will not be reached, thereby necessitating a repetition of the process.

It is not suggested that the loss of white students from the elementary schools is justification for denial

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[20]The actual percentage, computed on the basis that a 90% Negro school is an all or virtually all Negro school, was 63%.

of rights under the Equal Protection Clause. But the "percentage" test contains the seeds of its own destruction. It is an undeniable fact that desegregation cannot be accomplished without the presence of white students in the public schools. Surely it is not absolutely necessary for a community to watch more than 40% of its white students leave the public schools in the space of a year.[21] Continued instability and continued operation of the schools under plans designed without consideration of educational, administrative, and economic factors, all in the name of satisfying the elusive "percentage" test of the Court of Appeals, can only cause further deterioration of white enrollments.

D. *The Issues In this Case Differ From Those In Charlotte-Mecklenburg and Mobile*

While certain general questions of appropriate methods for desegregating urban school systems are before the Court this Term in *Swann v. Charlotte-Mecklenburg Board of Educ.*, No. 281, O.T. 1970, and *Davis v. Board of School Commissioners of Mobile County*, No. 436, O.T. 1970, the questions raised here are different. In the *Swann* case, this Court is faced with the broad question of abuse of remedial discretion. There the District Court, after an evidentiary hearing and in full possession of all relevant facts, ordered implementation of a desegregation plan prepared by a consultant working in concert with the local school staff. Adopting "the test of reasonableness", the Court

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[21] Enrollment of white students in the system was 20,966 in September, 1969, and 12,095 in September, 1970.

of Appeals reversed the elementary plan, holding that the District Court had created an unreasonable remedy to disestablish the dual system.

In *Davis,* this Court must decide the broad question of whether the decision of the Court of Appeals falls short of minimum constitutional requirements. In that case, the District Court, without an evidentiary hearing, ordered implementation of a final plan prepared by the school district when workable alternative plans maximizing integration had been prepared by HEW. The Court of Appeals assumed that its task was to maintain the "neighborhood school concept of the system", and on that basis ordered implementation of a modified HEW plan which did not utilize available transportation and facilities to maximize desegregation.

The instant case, however, raises the question whether the Court of Appeals can summarily reject an educationally sound plan maximizing integration, a plan prepared by HEW, concurred in by the school district and the plaintiffs and adopted by the District Court after a full evidentiary hearing. The basis of that summary rejection was failure to meet certain numerical results. It is difficult to believe that equal protection of the laws can be measured by statistical achievement.

In *Swann* the Court of Appeals adopted a vague standard of reasonableness, and on the application of that test reversed the District Court for abusing its discretion. In the present case the Court of Appeals adopted a rigid, inflexible and absolute standard measured by

statistical results, thereby eliminating any real need for the judgment and discretion of a trial court.

Thus the two cases stand at opposite ends of the spectrum; in one the standard is vague and uncertain, and in the other the standard is rigid and absolute. If the Fifth Circuit has applied a proper test, then every school district in the nation can be desegregated with the simple tools of a map and attendance figures.

II

The Court of Appeals Has Ordered the School District to Provide Transportation Service Which is Neither Authorized by State Law Nor Required by the Equal Protection Clause

One of the desegregation techniques commonly used by the Court of Appeals is the "majority to minority transfer rule." Under this requirement, school districts must allow a student attending a school in which his race is in the majority to choose to attend another school where his race is in the minority. The transferring student must be given an absolute priority for space, and he may elect to attend any school in the district, not necessarily the school nearest his home. Further, the students must be given transportation if they desire it.

The transportation feature of the rule, as expressed in the May 5, 1970, opinion of the Court of Appeals (22a), obligates the school district to perform a service which is not authorized by state law nor required by the equal protection clause of the Fourteenth Amendment. Further, the transportation directive to

this school district conflicts with other decisions of the Court of Appeals.

This Court's attention is particularly directed to the fact that no intra-city bus transportation has ever been provided in this school district. The only students legally entitled to transportation are those living within the district but outside the municipality who attend school inside the municipality, provided distance requirements are met.

The only statute dealing with the authority to provide intra-city transportation is Miss. Code Ann. §6336-31 (Supp. 1969) as follows:

> In addition to public school students or pupils authorized to be transported to the public schools by virtue of Chapter 15, Laws of the Extraordinary Session of 1953, as amended, appearing as Sections 6336-01 through 6336-21, Mississippi Code of 1942, the county board of education with the concurrence of the board of supervisors, the board of trustees of municipal separate school districts with the concurrence of the governing authorities of the municipality, and the governing board of any public school district with the concurrence of the appropriate governing authorities of the county or municipality, in their discretion and with local tax funds or other local contributions or support exclusively and without state appropriations, may provide transportation for students or pupils to the public schools whenever the within described boards or officers find that extraordinary circumstances and conditions are

> prevalent in said school district in regard to such matters as the public health and safety, school facilities, location of the school site, unusual economic growth and population expansion, newly expanded municipal corporation limits, the general welfare, and all other emergency facts and conditions which may be deemed by said authorities to be in the best interest of the political subdivision.

It is to be noted the foregoing statute is a limited grant of authority designed for use where "extraordinary circumstances and conditions are prevalent in [the] school district." In two recent decisions, the Court of Appeals has required transportation to be furnished under the majority to minority transfer rule only if the student is eligible for transportation under state law. In *Allen v. Board of Public Instruction of Broward County,* No. 30032 (5th Cir., Aug. 18, 1970), the District Court's majority to minority transfer rule was as follows:[22]

> 1. Any pupil with parental consent, shall have the right to transfer from a school at which his race is in the majority to the next nearest school at which his race is in the minority and the board shall furnish free transportation *provided the distance involved meets state transportation statutes.* [Emphasis added]
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> 2. Other reassignment requests will be considered providing the request does not in-

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[22]Slip opinion, p. 5.

> volve the transfer of a pupil [from a school] in which his race is in the minority to a school in which his race is in the majority.

The Court of Appeals noted:[23]

> On remand the district court's order must be modified to make it clear that (1) any pupil shall have the right to transfer from a school at which his race is in the majority to any school (not just the next nearest school) at which his race is in the minority and (2) transferees shall be given priority for space.

By not requiring a modification of the transportation provision in the District Court order, the Court of Appeals recognized the limitations imposed by state transportation laws.

Similarly, in *Hightower v. West,* No. 29933 (5th Cir., July 14, 1970), the Court of Appeals required the following:[24]

> The district court's majority-to-minority transfer provision must be modified to provide that (a) all transferring students shall be given transportation if they desire it. . .[8]

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[8]Except urban and suburban areas where public transportation is available and it is the policy of the State or local School Board not to furnish transportation.

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[23]Slip opinion, p. 6.
[24]Slip opinion, p. 14.

This Court's decisions requiring conversion of dual school systems to unitary ones have never gone so far as to require the *creation* of a transportation system to aid in disestablishing segregation. Indeed, it has been held that "[n]o one has a constitutional right to ride a school bus ... [but] merely the right not to be excluded from a benefit which is conferred by the state upon fellow citizens whose claim to it is no more 'reasonable' than his." *Sparrow v. Gill*, 304 F. Supp. 86, 90 (M.D. N.C. 1969). Other cases, such as *Swann v. Charlotte-Mecklenburg Board of Educ.*, No. 281, O.T. 1970, deal with the utilization of an *existing* transportation system to achieve a unitary plan, which system had been used to perpetuate a dual system.

The Jackson Municipal Separate School District has never provided intra-city transportation to any student, white or Negro. Its policy is neutral and non-discriminatory. Moreover, Mississippi has no so-called "anti-bussing" law.

The Court of Appeals should not be permitted to order school and municipal officials to provide transportation under a statute which is non-discriminatory, both on its face and in operation, and which, under no circumstances, can be construed as embracing the student transfers ordered by the Court of Appeals. Students transferring under the majority to minority rule should be furnished transportation only if entitled to it under state law.

CONCLUSION

For the foregoing reasons it is submitted that the Petition for Certiorari should be granted to review the judgments of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DEREK JEROME SINGLETON, ET AL,
Plaintiffs,
CIVIL ACTION
versus No. 3379

JACKSON MUNICIPAL SEPARATE
SCHOOL DISTRICT, ET AL,
Defendants.

ORDER PROVIDING FOR
UNITARY SCHOOL SYSTEM

On December 1, 1969, in Singleton, et al v. Jackson Municipal Separate School District, et al., No. 28261 on the docket of the U. S. Court of Appeals for the Fifth Circuit, the District Court was directed to require the Jackson Municipal Separate School District, hereinafter referred to as Board, to request the Office of Education of the Department of Health, Education and Welfare (HEW) to prepare plans for the merger of the student bodies into unitary systems, such plans to be filed with the District Court not later than January 6, 1970, together with such modifications as the School Board may wish to offer, and further directed the District Court to enter its final order not later

than February 1, 1970, setting out the details of a plan designed to accomplish a unitary system of pupil attendance with the start of the fall 1970 school term. The District Court was further directed to require said Board, as the first step in the conversion process, and no later than February 1, 1970, to announce and implement certain policies governing the desegregation of faculty and staff.

The District Court so directed the Board by order dated December 17, 1969, and in compliance with said order, HEW filed its Plans "A", "B", and "C" with this Court on January 6, 1970. On the same day the Board filed a proposed plan wherein it agreed to the desegregation of faculty and staff policies spelled out in the Singleton decision of December 1, 1969, and as directed by this Court in its order of December 17, 1969. The Board also requested a hearing on the plans for student assignment, which hearing, by order of this Court dated January 8, 1970, was set for January 19, 1970 in Jackson, Mississippi. On January 14, 1970, the Supreme Court of the United States granted certiorari in the Singleton case, reversing the December 1, 1969 ruling of the Fifth Circuit, and remanding the case for immediate implementation of a plan. Following this decision, the Fifth Circuit, by order of January 21, 1970, has again directed this Court to adopt a plan designed to accomplish a unitary system, but for immediate implementation rather than at the start of the fall 1970 school term.

Pursuant to its order of January 8, 1970, this Court held a hearing on HEW Plans "A", "B", and "C" and

on modifications thereto offered by the Board, filed herein on January 19, 1970, and after due and careful consideration of the plans and suggested modifications, and the testimony of witnesses, finds that the plan hereinafter set forth is designed to accomplish a unitary system, and the Board of Trustees of the Jackson Municipal Separate School District is hereby directed to adopt said plan for implementation with the opening of school on or after February 1, 1970.

The Court notes that the Jackson Municipal Separate School District has historically divided its twelve grades into three groups, elementary grades 1 to 6, junior high grades, 7, 8 and 9, and high school grades 10, 11 and 12, and that the current curricula is designed for this 6-3-3 structure. It goes without saying that a precipitate conversion of these schools in the middle of the year to a unitary system will occur with less disruption if the current structure is retained as long as the retention does not lessen the unitary effect.

Although total desegregation of every school in the system does not result from the plans offered by HEW, it is the opinion of the evaluation team that the basic structure of the dual system will be eradicated. The evaluation team of nine members was engaged from December 15, 1969, to January 5, 1970, in formulating these plans. Limiting factors considered by the evaluation team and which have likewise been considered by the Court are as follows:

1. State laws which restrict the transportation of students within the district.

2. The size of the district in relation to the location of the schools.

3. Natural and man-made barriers which constitute safety hazards or restrict mobility.

4. Demographic pattern of the district.

5. Attempts to anticipate and eliminate resegregation patterns.

6. Lack of a compulsory attendance law.

7. Development of a plan which would result in the least amount of disruption and which could be implemented immediately. Amplifying this factor, the necessity of adding temporary or portable classrooms to furnish sufficient capacity is avoided where possible, as is also the necessity for additional bus transportation.

ELEMENTARY SCHOOLS

As to elementary schools, HEW plans "A", "B" and "C" are the same. As the HEW evaluation team points out, not all the 38 elementary schools will be desegregated. Because elementary students are not as mobile as older students, the geographic zones are necessarily smaller than for the higher grades, and attendance is necessarily controlled by housing patterns and state-imposed restrictions of bussing.

The plan for the 38 elementary schools provides for the zoning of each, the boundaries being reflected on the elementary school map attached to the plan and made a part hereof as Exhibit "A". Watkins and Green schools are paired in one zone. The Board has requested no boundary changes except a modified boundary line between the Duling and Walton schools to relieve the overcrowding at Duling, and which modified boundary line is reflected on Exhibit "A". The Board seeks to modify the enrollment of eight schools, Key, Lester, Isable, Duling, Walton, Morrison, Watkins and Green.

As to Key Elementary the addition of 68 negro pupils drawn from the Isable zone as proposed by HEW would require additional space at Key, not now available, and would require these students of elementary age to travel a greater distance than to the school they now attend, where there is an excess of capacity. The Board requests that this group remain at Isable, which modification is granted.

As to Lester Elementary, the Board seeks to eliminate the addition of 152 negro pupils to be drawn from the Isable zone. As the capacity of this school is sufficient to include these 152 pupils, or a majority of them, this modification is denied to the extent that Lester is able to accommodate them.

As to Isable Elementary, HEW proposes to limit the grades to 1 to 5 and make it a part of an Isable-Hill complex which will include the attendance of a 9th grade. As this 9th grade is being otherwise provided for in the plan for junior high schools, the Board's

request that Isable remain a 1 to 6 grade school is allowed.

As to Duling, which has a permanent capacity for 384 students rather than 448 as shown in HEW's plan, the Board's request to reduce the number of negro pupils from the number set by HEW is granted to the extent of assigning no more than 190 negro pupils, or the maximum which this school can accommodate, and as permitted by the modified boundary line.

As to Walton Elementary, the Board modification to increase the number of negro pupils from 527 to 676 is automatic by the inclusion of those diverted from Duling.

The Board's requested modification as to Morrison to increase the number of negro students from 338 to 501 is granted in order to relieve the overtaxed capacity of Watkins.

The Board's requested modification for Watkins Elementary to reduce the number of negro pupils from 291 to 180 is granted inasmuch as the enrollment suggested by HEW far exceeds this school's capacity, requiring either double sessions or 13 portables. As modified, fewer portables will be required.

As to Green Elementary, the Board's requested modification is granted to the extent of reducing the number of negro pupils to the capacity of the building, 576.

It is to be noted that in the HEW pupil assignments to at least 13 of the elementary schools, the proposed assignments exceed the capacities of the respective schools which will necessitate the utilization of temporary or portable classrooms, a factor HEW failed to mention. In these assignments set forth hereinafter in the plan, the Court has indicated where one or more portables will be necessary. As to the schools where Board modifications are granted, the necessity of portables has been for the most part eliminated.

JUNIOR HIGH SCHOOLS

The HEW Plans "A" and "B" for the nine junior high schools contemplate five zones, with sub-zones, and would change the 3-grade structure in all but one zone, placing the 7 and 8th grades in one school and pairing them with a 9th grade school in the same zone or sub-zone, the one exception being in Zone II where all three grades would be in one building. These plans also contemplate the attendance of Zone I (one) 9th graders at the Isable-Hill complex, a feature which has been eliminated above. Plan C requires a new organizational pattern on a 2-2-2 structure for both the junior high and high school grades. The Board seeks to modify these plans so as to establish separate zones for the nine junior high schools composed of grades 7, 8 and 9, as shown by the zone map and metes and bounds descriptions attached hereto as Exhibit "B". The Board modification would retain the current 3-grade structure, obviating the necessity of formulating new curricula for a different structure, as proposed by HEW, and would tend to lessen the additional bus

transportation the HEW plans call for, all of which the Court finds are practical considerations in view of the immediacy of the conversion. The Court also notes that the head of the HEW evaluation team, who formulated the HEW plans and who testified on behalf of the plaintiffs, concedes that the proposed modification by the Board will result in a unitary system for the junior high level. Accordingly, the Court approves and allows the Board's requested modification for the junior high schools.

As Plan "C" has been rejected above, it is not necessary to consider its application to the high school level.

HIGH SCHOOLS

With respect to the high schools, the HEW Plans, "A", "B" and "C", each change the 3-grade structure as it now exists, and for the same reasons that apply to the junior high schools, are rejected. Changes as proposed by the HEW plans would require an extension of time, not now available, in reorganizing physical facilities, re-registering pupils, re-assigning members of the faculty, re-arranging the present 3-grade curricula, constructing additional class rooms or re-locating temporary or portable class rooms, and transferring supplies and equipment, including the re-installation of biology laboratory equipment. Also the HEW proposed use of Lanier and Central high schools as target schools with specialized courses, if not so used, could result in over taxing the capacity of the remaining schools by as much as 20%. By way of illustration HEW Plan "A" assigns 1912 students to the proposed

Wingfield-Hill complex with a total capacity of 1788; a total of 1406 students to Provine with a capacity of 1180; a total of 1303 students to Murrah which has a capacity with portables of 1232; a total of 1610 students to Callaway, with a capacity of 786 with portables; and a total of 1637 students to Brinkley with a total capacity of 1154. On the other hand, if used exclusively for specialized courses, these two schools, under the HEW plan would most likely become resegregated.

Instead, the Board proposes to retain the 3-grade structure of 10th, 11th and 12th grades in one school, and establish separate zones for the eight senior high schools. Under the Board plan, similarly to that of HEW, Lanier and Central would serve as magnet schools drawing from the entire district students desiring to take their specialized vocational and technical programs which are not offered at the remaining high schools, at the same time retaining students of both races attending these schools by virtue of their residence. The Board's projected attendance at these eight high schools, as shown by their modifications on file herein amply meet all unitary school characteristics with the possible exception of Wingfield where only 44 negro pupils would attend with 829 white pupils, and Callaway, where only 185 negroes would attend with 1104 white students. Accordingly, to increase the negro attendance at Wingfield, this Court has *redrawn* zones I and II, to add a portion of Zone II to Zone I, thereby increasing the negro attendance at Wingfield and at the same time reducing negro attendance at Hill, resulting in a more proportionate ratio of black

students to white. This modification of the zone line between Zones I and II is reflected on the zone map and boundary descriptions for the high schools, attached hereto as Exhibit "C".

Testimony at the hearing indicated that negro students residing in the northeastern part of this entire school system, in and around Tougaloo, and in the northwestern part of the district, now attending schools other than Callaway, would, under the Board plan, begin attendance at Callaway high school, thereby improving the racial balance of this school. Accordingly the Court approves the proposed Board modifications as they in turn are modified by the Court.

In accordance with the above, this Court finds and approves the following plan as a unitary school plan for the Jackson Municipal Separate School District, and directs the school board to adopt said plan and put it into immediate effect with the opening of school on or after February 1, 1970.

UNITARY SCHOOL PLAN

DESEGREGATION OF FACULTY AND STAFF

The School Board shall announce and implement the following policies:

1. Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will

the racial composition of a staff indicate that a school is intended for negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff members to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruit-

ment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period.

TRANSPORTATION

The transportation system shall be completely re-examined regularly by the superintendent, his staff, and the school board. Bus routes and the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis.

SCHOOL CONSTRUCTION AND SITE SELECTION

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented.

ATTENDANCE OUTSIDE SYSTEM OF RESIDENCE

If the school district grants transfers to students living in the district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district or reinforce the dual school system.

PUPIL ASSIGNMENT

ELEMENTARY SCHOOLS
(Grades 1 to 6)

The geographic boundaries to all elementary zones are shown on the elementary school map, attached hereto as Exhibit "A". Exact attendances will be determined from boundary descriptions to conform to zone lines as they are shown on said map.

1. Sykes Elementary School includes grades 1-6 with an approximate enrollment of 544 white students. Approximate capacity for this building is 576.

2. Lee Elementary School includes grades 1-6 with an approximate enrollment of 370 white students. Approximate capacity for this building is 416.

3. Marshall Elementary School includes grades 1-6 with an approximate enrollment of 600 white pupils. Approximate capacity of this building is 576. A portable will be necessary.

4. Baker Elementary School includes grades 1-6 with an approximate enrollment of 334, consisting of 310 white and 24 negro pupils. Approximate capacity of this building is 512.

5. Wilkins Elementary School includes grades 1-6 with an approximate enrollment of 616, consisting of 600 white and 16 negro pupils. Approximate capacity for this building is 416. Portables will be necessary.

6. Key Elementary School includes grades 1-6, with an approximate enrollment of 513 white pupils. Approximate capacity of this building is 576.

7. Lester Elementary School includes grades 1-6 with an approximate enrollment of 472, consisting of 320 white pupils and 152 negro pupils or as many negro pupils up to 152 as the school will accommodate. Approximate capacity of this building is 480. The negro pupils are to be drawn from the Isable zone.

8. Clausell Elementary School includes grades 1-6 with an approximate enrollment of 212, consisting of 47 white pupils and 165 negro pupils. Approximate capacity for this building is 224.

9. Isable Elementary School includes grades 1-6 with an approximate enrollment of 860 negro pupils. Approximate capacity of this building is 1120.

10. Reynolds Elementary School includes grades 1-6 with an approximate enrollment of 1009 negro pupils. Approximate capacity for this building is 1088.

11. George Elementary School includes grades 1-6 with an approximate enrollment of 206, consisting of 100 whites and 106 negro pupils. Approximate capacity for this building is 192. Should attendance exceed capacity, the overflow may be assigned to Martin Elementary.

12. Martin Elementary School includes grades 1-6 with an approximate enrollment of 296, consisting of

76 white pupils and 200 negro pupils. Approximate capacity for this building is 384.

13. Lake Elementary School includes grades 1-6 with an approximate enrollment of 600 white pupils. Approximate capacity for this building is 576. A portable will be necessary.

14. Whitfield Elementary School includes grades 1-6 with an approximate enrollment of 448, consisting of 282 white pupils and 166 negro pupils. Approximate capacity for this building is 416. Portables will be needed.

15. Barr Elementary School includes grades 1-6 with an approximate enrollment of 213, consisting of 123 white pupils and 90 negro pupils. Approximate capacity for this building is 192. Portables will be needed.

16. Poindexter Elementary School includes grades 1-6 with an approximate enrollment of 149, consisting of 47 white pupils and 102 negro pupils. Approximate capacity for this building is 192.

17. Robertson Elementary School includes grades 1-6 with an approximate enrollment of 581, consisting of 6 white pupils and 575 negro pupils. Approximate capacity for this building is 544. A portable will be necessary.

18. Davis Elementary School includes grades 1-6 with an approximate enrollment of 228, consisting of 46 white pupils and 182 negro pupils. Approximate ca-

pacity for this building is 224. A portable will be necessary.

19. Jones Elementary School includes grades 1-6 with an approximate enrollment of 1241, consisting of 70 white pupils and 1171 negro pupils. Approximate capacity for this building is 1248.

20. Galloway Elementary School includes grades 1-6 with an approximate enrollment of 447, consisting of 185 white pupils and 262 negro pupils. Approximate capacity for this building is 448.

21. Brown Elementary School includes grades 1-6 with an approximate enrollment of 575 negro pupils. Approximate capacity for this building is 832.

22. Power Elementary School includes grades 1-6 with an approximate enrollment of 599, consisting of 383 white pupils and 216 negro pupils. Approximate capacity for this building is 544. Portables will be necessary.

23. Raines Elementary School includes grades 1-6 with an approximate enrollment of 852, consisting of 780 white pupils and 72 negro pupils. Approximate capacity for this building is 736. Portables will be needed.

24. French Elementary School includes grades 1-6 with an approximate enrollment of 437, consisting of 354 white pupils and 83 negro pupils. Approximate capacity for this building is 576.

25. Johnson Elementary School includes grades 1-6 with an approximate enrollment of 1094, consisting of 71 white pupils and 1023 negro pupils. Approximate capacity for this building is 1088. Portables will be needed.

26. Duling Elementary School includes grades 1-6 with an approximate enrollment of 384, consisting of 194 white pupils and 190 negro pupils, or less, as the school can accommodate. Approximate capacity for this building is 384.

27. Casey Elementary School includes grades 1-6 with an approximate enrollment of 420 white pupils. Approximate capacity for this building is 576.

28. Bradley Elementary School includes grades 1-6 with an approximate enrollment of 326, consisting of 33 white pupils and 293 negro pupils. Approximate capacity for this building is 384.

29. Smith Elementary School includes grades 1-6 with an approximate enrollment of 917 negro pupils. Approximate capacity for this building is 928.

30. Walton Elementary School includes grades 1-6 with an approximate enrollment of 676 negro pupils. Approximate capacity for this building is 1120.

31. Dawson Elementary School includes grades 1-6 with an approximate enrollment of 452 consisting of 65 white pupils and 387 negro pupils. Approximate capacity for this building is 608.

32. Morrison Elementary School includes grades 1-6 with an approximate enrollment of 501 negro pupils. Approximate capacity for this building is 616. This zone also includes the developing area around Lake Hico. A new school site has been selected and will be developed. The new school will be paired with Morrison or will replace Morrison.

33. Watkins Elementary School includes grades 3-6 with an approximate enrollment of 953, consisting of 773 white pupils and 180 negro pupils. Approximate capacity for this building is 608. Portables will be necessary.

34. Boyd Elementary School includes grades 1-6 with an approximate enrollment of 552, consisting of 395 white pupils and 127 negro pupils. Approximate capacity for this building is 576.

35. Green Elementary School includes grades 1-2 with an approximate enrollment of 529 pupils, consisting of 380 white pupils and 149 negro pupils. Approximate capacity for this building is 576.

36. McWillie Elementary School includes grades 1-6 with an approximate enrollment of 698, consisting of 624 white pupils and 74 negro pupils. Approximate capacity for this building is 620. Portables will be needed.

37. Spann Elementary School includes grades 1-6 with an approximate enrollment of 578, consisting of 539 white pupils and 39 negro pupils. Approximate capacity for this building is 540. Portables will be needed.

38. McLeod Elementary School includes grades 1-6 with an approximate enrollment of 566, consisting of 500 white pupils and 66 negro pupils. Approximate capacity for this building is 608.

JUNIOR HIGH SCHOOLS
(Grades 7, 8 and 9)

The junior high schools are zoned into nine zones as reflected on the zoning map and boundary descriptions attached hereto as Exhibit "B".

The names of the schools, approximate enrollment and capacities of each school are shown as follows:

Name of School	*Approximate Enrollment*			*Total Capacity*
	White	*Negro*	*Total*	
Whitten Junior High	515	250	765	868
Peeples Junior High	930	367	1290	1286
Blackburn Junior High	268	656	924	1458
Hardy Junior High	734	442	1176	1278
Enochs Junior High	176	661	837	830
Rowan Junior High	140	478	618	996
Bailey Junior High	843	586	1429	1310
Powell Junior High	901	649	1550	1574
Chastain Junior High	898	541	1439	1234

SENIOR HIGH SCHOOLS
(Grades 10, 11 and 12)

The senior high schools are zoned into eight zones as reflected on the zoning map and boundary descriptions attached hereto as Exhibit "C".

Two schools — Lanier and Central — will serve as magnet schools drawing from the entire district. These schools will house specialized vocational and technical programs which are not presently offered at any school other than at one or both of such schools. All students now attending Lanier who do not reside in the Lanier zone, or those now attending Central who do not reside in the Central zone will continue to attend the school they are now attending, provided they are enrolled in a specialized program not offered at any school other than Central or Lanier. Any student not presently enrolled in either Lanier or Central and who do not reside in the Lanier or Central zone may attend one of these schools only if he enrolls in a specialized program not offered in the high school to which he is zoned.

The names of the schools, approximate enrollment and capacities of each school are shown as follows:

Name of School	*Approximate Enrollment*			*Capacity*	*With Portables*
	White	*Negro*	*Total*		
Wingfield High School	829	*44	873	894	1154
Hill High School	177	!356	533	894	
Central High School	473	168	641	1000	
Provine High School	720	533	1253	1180	
Lanier High School	294	578	872	1200	
Murrah High School	987	316	1303	1180	1232
Brinkley High School	78	1108	1186	1154	
Callaway High School	1104	185	1289	998	1336

***To be increased in accordance with Court modification of Zone I.**
!To be decreased in accordance with Court modification of Zone II.

The Clerk of this Court is directed to file a copy of this Plan with the Clerk of the United States Court of Appeals for the Fifth Circuit.

SO ORDERED this the 22nd day of January, 1970.

(Signed) DAN M. RUSSELL, JR.
UNITED STATES
DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29226

DEREK JEROME SINGLETON, ET AL.,
Plaintiffs-Appellants,
versus

JACKSON MUNICIPAL SEPARATE
SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(May 5, 1970)

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

BROWN, Chief Judge: This is an appeal from an order of the District Court entered pursuant to the remand from Singleton v. Jackson Municipal Separate School District (Singleton III),[1] 5 Cir., 1969, ____ F.2d ____ (consolidated cases en banc) [No. 26285, Dec. 1, 1969], rev'd in part, sub nom., Carter v. West Feliciana Parish School Bd., 1970, ____ U.S. ____, ____ S.Ct. ____, 24 L.Ed.2d 477. Prior to this remand the district was operating under a *Jefferson*[1A] model freedom-of-choice plan. And after remand for the adoption of a unitary plan the District Court called for the school board to invoke the assistance of the Office of Education of the United States Department of Health, Education and Welfare in preparing new desegregation plans. HEW filed a plan with three alternative proposals for secondary schools. The school board proposed modifications (see note 8, *infra*) that reduced the amount of desegregation that would result and these modifications were, after an evidentiary hearing on January 19, 1970, for the most part approved by the District Court. And this new plan was ordered implemented on February 1, 1970.

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[1]This is one of a long series of cases involving the Jackson Municipal School District's operation of a dual school system. Evers v. Jackson Municipal Separate School Dist., 5 Cir., 1964, 328 F.2d 408; Singleton v. Jackson Municipal Separate School Dist., 5 Cir., 1965, 348 F.2d 729 (Singleton I); Singleton v. Jackson Municipal Separate School Dist., 5 Cir., 1966, 355 F.2d 865 (Singleton II).

[1A]United States v. Jefferson County Board of Education, 5 Cir., 1966, 372 F.2d 836.

Our concern is whether the system approved by the District Court is unitary. We believe that, although faculty,[2] staff, extra curricular activities, etc., see Green v. County School Bd. of New Kent County, 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716; Ellis v. Board of Public Inst. of Orange Cty., 5 Cir., 1970, ____ F.2d ____ [No. 29124, Feb. 17, 1970], appear so far to have become unitary, the existence of a substantial number of schools with segregated student bodies, the students of which will for a large part have a completely segregated education, prevents the system from being a unitary one when there is a reasonable alternative plan that will result in a more nearly unitary system. We thus remand this case.[3]

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[2]We note that the District Court's order providing for the reassignment of faculty and staff obligated the school district to meet the *Singleton* III faculty-staff assignment ratio, which by its terms prescribed ratios for the 1969-70 school year, only for the 1969-70 school year. But it is plain that resegregation can occur as much from faculty assignments as from student assignments. And it is plain that any future substantial deviations from the Singleton III ratios will require a showing that there is a unitary system and that such deviations will not tend to reestablish a dual system. We emphasize this without any prejudgment of the merits because plaintiffs-appellants have suggested in the comments requested by the Court (see notes 3, 4, 5, and 6, *infra*) that there is a significant possibility that the school district will abandon these ratios for the 1970-71 school year.

[3]Under the stringent requirements of *Alexander v. Holmes County Board of Education*, supra, which this court has carried out in *United States v. Hinds County School Board*, 5 Cir., 1969, ____ F.2d ____ [Nos. 28030, 28042, Nov. 7, 1969], this court has judicially determined that the ordinary procedures for appellate review in school segregation cases have to be suitably adapted to assure that each system, whose case is before us, "begin immediately to operate as unitary school systems." Upon consideration of the record, the court has proceeded to dis-

I.
The Proposals for Unitary System

At the commencement of the 1969-70 school year, Jackson had 10,527 Negro and 10,432 white elementary school students attending 38 elementary schools. Of those schools, 13 were all- or virtually all-Negro and 20 were all- or nearly all-white. Of the 5 substantially integrated schools, 3 were predominantly Negro, 2 predominantly white. And Jackson was operating 9 junior high schools (grades 7-9), 2 junior-senior high schools (grades 7-12), and 6 senior high schools (grades 10-12). There were 7,700 Negro and 10,380 white students enrolled. Of those students, 7,300 (93.5%) Negroes were enrolled in 6 all-Negro schools. All of the white students attended 11 schools ranging from 86.5 to 100 percent white.

A. The Basics of the HEW Plan

The plan suggested by HEW to remedy this is essentially a zone plan. It was constructed on the assumption that other alternatives were foreclosed by state statutory limitations on state-granted financial assistance to local school districts to provide intracity transportation.[4] In addition, the HEW plan indicated that other

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pose of this case as an extraordinary matter. Rule 2, FRAP. The Court has, however, solicited supplemental briefs and data and has all necessary material for consideration on the merits. (See notes 4, 5, and 6 *infra*)

[4]At the Court's request counsel for plaintiffs-appellants and the school board supplied the Court with copies of the state statutes that restrict financial assistance to local districts for intracity bussing. Miss. Stat. Ann. §§ 6336-et seq. They were

limitations "to developing a plan resulting in total desegregation of all schools in the system were" (1) the size of the district, (2) natural and man-made barriers that constitute safety hazards and restrict mobility,[5] (3) demographic pattern of the district, (4) lack of a compulsory attendance law, (5) possibility of resegregation and (6) the need to develop a "plan which would result in the least amount of disruption and which would be implemented immediately."

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asked to comment on the constitutionality of the statutes and counsel agreed that the statutes of the state did not suffer from any constitutional defects since the school district has the power to provide transportation to pupils not eligible for state-aided bussing (Miss. Stat. Ann. § 6336-01).

[5]Counsel were also asked to comment on the extent to which these barriers were a limitation on the development of a unitary school district. The following is part of the statement of Dr. H. Larry Winecoff, director of the team that prepared the HEW plan. The statement was submitted to the Court's request:

> "We did not consider that there were any natural or man-made barriers in Jackson to our Junior-Senior High School program. However, at the elementary level the following such barriers exist, and were considered:
>
> 1) Highway 80 located in South Jackson. This four lane highway prevented us from assigning black children in grades 1-5 to Key and Lester and it prevented the assignment of white children to Isable. We considered 6th graders old enough to negotiate this barrier.
>
> 2) There is an airport-industrial complex-golf course, located in the mid-western section of the Town. This area limited our alternatives to some extent.
>
> 3) There is a railroad freight yard in the inner-city which limited our alternatives to some extent."

B. The Results at the Elementary Level[6]

The HEW plan was a zoning plan within the framework of the former 1-6 grade structure. The zoning was designed to maximize desegregation and was supplemented by pairing of two schools and a cross-zone assignment of two schools. It was projected that the plan would produce 5 all-white schools and 6 all-black schools with 15 predominantly white schools and 12 predominantly black schools.[7]

This was basically the plan adopted by the District Court.[8] But not even these projected results have been

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[6]Plaintiffs-appellant's original complaint was that the dual system had not been eliminated at the secondary level. Their complaints regarding the elementary level were concerned only with situations where there was a very close relationship between the elementary and secondary level as in the Isable-Hill complex, which under the HEW plan would serve both as an elementary and 9-10 grade school. As we did in *Singleton III*, however, we look at the whole system. And plaintiffs-appellants have, after letter inquiry from this Court (see notes 4 and 5, *supra*, challenged the modifications of the elementary plan approved by the District Court. But we do not limit ourselves to these modifications. Instead, we concern ourselves with the overall workings of the system — all aspects of the elementary and secondary levels.

[7]The projected enrollment for each elementary school under this HEW plan is set out in Appendix A.

[8]The board's proposed modifications at the elementary level focused on 8 schools. The board requested that the number of Negroes assigned to 4 predominantly white schools be reduced, that one school that was projected to be predominantly Negro be made predominantly white and that the enrollment of 3 all Negro schools be increased. The schools effected were Key, Lester, Watkins, Green, Duling, Isabelle, Walton and Morrison. See Appendix A. The District Court allowed the proposed modifications where it found that the capacity of the school would be exceeded under the HEW plan and where portable classrooms would have to be relocated.

achieved. As of March 26, 1970[9] there were seven elementary schools with all black student bodies and six more in which the student body is made up of at least ninety percent Negro students. In addition there are 6 elementary schools out of a total of 38 that have only white students attending them and two other schools with over ninety percent white student bodies.

C. Results at the Secondary Level

The direct challenge here is not, however, to the elementary system, but is to the school board's modifications of the HEW plan — or more appropriately plans A, B, and C — at the secondary level. (See note 6, *supra*). The HEW plans were based on principles of pairing and zoning. All three plans resulted in breakdown of the grade structure — 6-3-3 — under which the district had previously been operating. Plan B, for which plaintiffs-appellants expressed a preference, proposes geographic zoning with junior high schools continuing to serve one or more of grades 7 through 9. Under Plan B, of the eleven junior high schools, one would serve grades 7-9, six would serve grades 7-8, and four would serve grade 9 only. Plan B calls for the same type of organization at the high school level — six high schools are to serve grades 10-12, two are to serve grades 11-12, and one grade 10 only.

The modifications proposed by the Board and adopted by the District Court were not really modifications

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[9]At the Court's request the school board supplied the Court with the latest enrollment data available as of March 26, 1970. This information is set out in Appendix B.

at all. They were instead a completely different plan based on geographic zoning. The zoning was, however, based on the assumption of retaining the District's 6-3-3 grade structure.

After approximately six weeks operation under this plan there were 7537 white students and 8156 Negro students in the District's secondary schools. There were no all-Negro or all-white secondary schools. (See Appendix B). There are, however, at least four schools where the student body is overwhelmingly Negro.[10] In contrast, the projected enrollment under any of the HEW plans would not have produced any virtually all-Negro schools. See Appendices C-E.

II.
Deficiencies in the Present Plan

It is not contended that the school board's zoning plan was gerrymandered to produce little desegregation. But it is contended that the school board plan is not the best available alternative. Andrews v. City of Monroe, 5 Cir., 1970, ____ F.2d ____ [No. 29358, April , 1970]. And it is contended that the board has not carried "its . . . heavy burden . . . to explain its preference for an apparently less effective method." Green v. County School Board of New Kent County, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, _____, 20 L.Ed.2d 716, 724. It is also claimed that the school board's secondary

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[10]Blackburn Junior High has 593 Negroes and 34 whites, Rowan Junior High has 609 Negroes and 31 whites, Brinkley High School has 1076 Negroes and 2 whites, Lanier High School has 713 Negroes and 7 whites. See Appendix B.

plan zone lines were not drawn to promot e desegrega-
tion as required by this Court. Valley v. I Rapides Par-
ish School Bd., 5 Cir., 1970, — F.2d — [No. 29237,
March 6, 1970]; United States v. Indiano la Municipal
Separate School Dist., 5 Cir., 1969, 410 F.2 2d 626; Davis
v. Board of School Commissioners of M obile County,
5 Cir., 1968, 393 F.2d 690.

We are of the clear view that the pla intiffs'-appel-
lants' complaints are valid. Jackson Se parate School
District is not a unitary system. The de eficiencies do
not lie in the simple existence of some schools that
are all or virtually all Negro or white. Th ey lie instead
in the fact that a substantial number of N egro students
will receive their entire public school ed ucation in a
segregated school environment,[11] which n is presum-
ably largely the result of the State's op peration of a
dual school system with school locate to serve that
system. And these deficiencies are cr cal in light of
the existence of readily available m ans, which can
be implemented without significant ad ministrative, ed-
ucational, economic, or transportation costs (see note
14, *infra*), to avoid for substantially ll the students
of this district the school life-long se regated educa-
tion. See Andrews v. City of Monroe, *supra*.

This Court realizes that the time f r adoption and
effectuation of a plan in this school d strict was short

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[11]Although there is no formal feeder system p the ladder from
grade 1 through 12 in the District, a comp rison of attendance
zone lines for elementary and secondary s hools indicates that
out of a total Negro student body of 10, 58, about 3500 Ne-
gro elementary students attending all Negr elementary schools
will attend virtually all Negro secondary schools.

and that the physical and logistical problems involved were great. And it recognizes that significant progress has been achieved both as to the student body and the other *Green* factors as a result of the plan put into effect pursuant to the District Court's order. Although under the stringent mandate of Alexander v. Homes County Board of Education, 1969, 396 U.S. 19, ____ S.Ct ____, ____ L.Ed.2d ____; Carter v. West Feliciana Parish School Board, 1970, ____ U.S. ____, ____ S.Ct. ____, 24 L.Ed.2d 477, this was to be a final plan, two things warrant comment. First, the Judge approached it in terms of immediacy with some expectation of correcting deficiencies[12] revealed by actual operation. Sec-

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[12]It is apparent from reading the District Court's opinion that the practical problems faced by the school district took on great importance. It seems clear that this was the basic reason the Trial Judge adopted the school board's secondary plan. It minimized the disruption resulting from a change in the grade structure and the need to relocate portable classrooms.

He said:

> "The Board modification [as to junior high schools] would retain the current 3-grade structure, obviating the necessity of formulating new curricula for a different structure, as proposed by HEW, and would tend to lessen the additional bus transportation the HEW plans call for, all of which the Court finds are practical considerations in view of the immediacy of conversion. . . .
>
> . . .
>
> . . . Changes as proposed by the HEW plans would require an extension of time, not now available, in reorganizing physical facilities, re-registering pupils, re-assigning members of the faculty, re-arranging the present 3-grade curricula, constructing additional classrooms or relocating temporary or portable classrooms, and transferring supplies and equipment, including the reinstallation of biology laboratory equipment."

ond, we have to look on it in terms of its acceptability as a final plan now.

Furthermore, we are not now confronted with the problems and dislocations that a midyear change in the traditional grade structure — 6-3-3 — would involve. (See III (2), *infra*). Although the changes under the HEW plans for the secondary schools may require future adjustment, they are not educationally, administratively, or economically unreasonable. And it appears that under these circumstances and in this case, subject, of course, to the experience of actual operation, there is a good possibility that these plans will establish a unitary school system at the secondary level.

III.
Steps to be Taken to Correct Deficiencies

In order to achieve a unitary system it is necessary that steps be taken immediately:

1. A majority to minority transfer rule[13] must be adopted and all transferring students must be given transportation if they desire it. As approved in Ellis v. Board of Public Inst. of Orange Cty., 1970, ____ F.2d ____ [No. 29124, Feb. 17, 1970, slip op. p. 6], the transferee is to be given priority for space and thus the transfer is not to be dependent on space being avail-

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[13]Counsel have indicated it was intended that a majority to minority transfer provision be included in the District Court's order and that its omission was inadvertent.

able. See also Taylor v. Ouachita Parish School Bd., 5 Cir., 1970, ____ F.2d ____ [No. 29215, April 13, 1970].

2. Second, the district is to adopt one of the presently available HEW plans for the secondary level for use in the 1970-71 school year. These are the only currently available plans that give any promise of presently ending the dual system.[14] United States v. Board of Education of Baldwin Cty., 5 Cir., 1970, ____ F.2d ____ [No. 28880, March 9, 1970]; Banks v. Claiborne Parish School Board, 5 Cir., 1970, ____ F.2d ____ [No. 29192, April 15, 1970]. The plan adopted shall remain in effect until, after substantial operation under the plan during the 1970-71 school year, it can be shown that modifications[15] are needed and there is a finding that such

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[14]As illustrated by the following chart the HEW plans will result in no major changes in the number of students transported by the system.

Plan	*Students Transported*
Freedom of Choice (Prior to Remand)	2379
HEW A	3567
HEW B	2234
HEW C	(same as plan B)

(figures for the present plan are unavailable)

In fact, HEW Plan B would reduce the transportation burden below that under the freedom of choice plan. Moreover, nearly all problems of building capacity can be solved by the shifting of presently available portable buildings. And there are no major problems of either economics or administration presented by the plan.

[15]In connection with both the mandatory revision at the elementary level and the likelihood of some modifications being proposed for the secondary level, it bears emphasizing that *Ellis* does not stand for the universal proposition that equidistant or capacity zoning establishes unitary schools in all cases. This is the clear holding of our recent case of Andrews

modifications will not tend to reestablish a dual school system or that operation under the plan has not in fact produced a unitary system. We specify July 1, 1970[16] as the date to be fixed by the District Court for making pupil assignments for the 1970-71 school year and notifying parents of those assignments.

3. The District Court shall without delay initiate proceedings to eliminate the dual system which still remains in the elementary level. The District Court shall call for new proposals from the parties, HEW, and the bi-racial committee.

It is evident that the factors delineated by the HEW plans as reasons for not more fully desegregating the elementary level cannot justify this continued segregation. And it is also evident that the burden will be heavy on the school district to find alternatives that

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v. City of Monroe, 5 Cir., 1970, _____ F.2d _____ [No. 29358 April , 1970] which quotes the following from *Ellis:*

> " 'Under the facts of this case, it happens that the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system. This decision does not preclude the employment of differing assignment methods in other school districts to bring about unitary systems. There are many variables in the student assignment approach necessary to bring about unitary school systems. The answer in each case turns, in the final analysis, as here, on all of the facts including those which are peculiar to the particular system.' "

Andrews, supra, _____ F.2d at _____, quoting *Ellis*, supra, _____ F.2d at _____ [slip op. p. 11-12, n.7].

[16]Pursuant to letter request by the Court, see notes 4, 5 and 6, *supra*, counsel inform us that the present school year ends on June 4, 1970, and that classes begin for the 1970-71 school year on September 8, 1970.

hold promise of disestablishing the dual system now. And the District Court shall make findings of fact that specifically evaluate the alternatives in terms of cost as well as administrative, educational, or economic factors bearing on the elimination of the dual system. The findings shall specifically include the reasons, if any, for the continuation of any all Negro or all white schools.[17] The District Court shall expedite this proceeding and shall have completed all findings and entered all orders by June 15, 1970. The time for assignments and notification pursuant to this order is, as in paragraph 2 above, to be on July 1, 1970. Further proceedings in the District Court are to conform to part III of Singleton v. Jackson Municipal Separate School District, 5 Cir., 1969, ____ F.2d ____ (consolidated cases en banc) [No. 26285, Dec. 1, 1969].

4. Following the pattern of *Ellis*, *supra*, and United States v. Hinds County School Bd., 5 Cir., 1970, ____ F.2d ____ [No. 28030, March 31, 1970], a bi-racial committee is to be constituted by the District Court from names submitted by the parties to this suit. The number of members is to be left to the District Court, but there shall be no more than 40 nor less than 10 members. The membership is to be divided equally between whites and Negroes. The chairmanship is to alternate annually between a white chairman and a Negro chairman. This committee is to recommend to the school board ways to attain and maintain a unitary system.

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[17]On this record in this posture we do not prejudge whether, to what extent, or under what circumstances such conditions may exist and satisfy the requirements of a unitary system.

5. Finally, the District Court is to retain jurisdiction of this case and the school board and the bi-racial committee are to make bi-annual reports — on December 1 and April 1 — to it on the maintenance of a unitary school system.[18] Such reports are to be made until

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[18]The reports should include the following information:

I.

(a) The number of students by race enrolled in the school district;

(b) The number of students by race enrolled in each school of the district;

(c) The number of students by race enrolled in each classroom in each of the schools in the district.

II.

(a) The number of full time teachers by race in the district;

(b) The number of full time teachers by race in each school in the district;

(c) The number of part time teachers by race in the district;

(d) The number of part time teachers by race in each school in the district.

III.

Describe the requests and the results which have accrued, by race, under the majority to the minority transfer provision which was a part of this court's order of November 7, 1969.

IV.

State the number of inter-district transfers granted since this court's order of November 7, 1969, the race of the students who were granted such transfers, and the school district to which the transfers were allowed.

V.

State whether the transportations system, if any, in the district is desegregated to the extent that Negro and white students are transported daily on the same buses.

VI.

State whether all facilities such as gymnasiums, auditoriums, and cafeterias are being operated on a desegregated basis.

the District Court finds that the dual system will not be or tend to be reestablished.

REVERSED and REMANDED.

Appendix A

Projected Enrollment under HEW Plan for Elementary Schools

School	*White*	*Negro*	*Building Capacity*
Sykes	544	0	576
Lee	370	0	416
Marshall	600	0	576
Baker	310	24	512
Wilkins	600	16	416
Key	513	68	576
Lester	320	152	480
Clausell	47	165	224

VII.

Give brief description of any present or proposed construction or expansion of facilities.

VIII.

(a) State whether the school board has sold or abandoned any school facility, equipment, or supplies having a total value of more than $500.00 since this court's order of November 7, 1969.

IX.

(a) Give a brief description of the work of the bi-racial committee since the last report.

(b) Copies of all recommendations made by the bi-racial committee.

See United States v. Hinds County, 5 Cir., 1970, ____ F.2d ____ [No. 28030 March 31, 1970].

School	*White*	*Negro*	*Building Capacity*
Isable*	0	640	1120
Reynolds	0	1009	1088
George	100	106	192
Martin	76	220	384
Lake	600	0	576
Whitfield	282	166	416
Barr	123	90	192
Poindexter	47	102	192
Robertson	6	575	544
Davis	46	182	224
Jones	70	1171	1248
Galloway	185	262	448
Brown	0	575	832
Power	383	216	544
Raines	780	72	736
French	354	83	576
Johnson	71	1023	1088
Duling	194	227	448
Casey	420	0	576
Bradley	33	293	384
Smith	0	917	928
Walton	0	527	1120
Dawson	65	387	608
Morrison	0	338	616
Watkins	773	291	608
Boyd	395	127	576
Green	380	149	576

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* Not considered an all black school under the HEW plan because it was to be part of an integrated elementary-secondary complex.

School	*White*	*Negro*	*Building Capacity*
McWillie	624	74	620
Spann	539	39	540
McLeod	500	66	608
	10350		

Appendix B

JACKSON PUBLIC SCHOOLS
Jackson, Mississippi

Student Enrollment as of March 26, 1970

SCHOOL ELEMENTARY	*NEGRO*	*OTHER*	*TOTAL*
Baker	4	321	325
Barr	41	83	124
Boyd	168	420	588
Bradley	339	14	353
Brown	658	0	658
Casey	0	451	451
Clausell	201	5	206
Davis	309	55	364
Dawson	421	10	431
Duling	126	115	241
French	138	313	451
Galloway	388	170	558
George	67	111	178
Green	123	480	603
Isable	760	0	760

ELEMENTARY	*NEGRO*	*OTHER*	*TOTAL*
Johnson	857	54	911
Jones	1248	10	1258
Key	0	487	487
Lake	0	609	609
Lee	0	365	365
Lester	99	236	335
Marshall	0	569	569
Martin	207	20	227
McLeod	50	669	719
McWillie	64	502	566
Morrison	481	0	481
Poindexter	91	85	176
Power	37	368	405
Raines	131	502	633
Reynolds	999	0	999
Robertson	317	0	317
Smith	1024	0	1024
Spann	47	491	538
Sykes	0	457	457
Walton	852	0	852
Watkins	132	517	649
Whitfield	163	238	401
Wilkins	16	490	506
TOTAL	10558	9217	19775

SECONDARY	*NEGRO*	*OTHER*	*TOTAL*
Bailey	514	408	922
Blackburn	593	34	627
Chastain	523	660	1183
Enochs	562	101	663
Hardy	424	758	1182
Peeples	218	864	1082
Powell	796	673	1469
Rowan	609	31	640
Whitten	346	579	925
Brinkley	1076	2	1078
Callaway	86	1027	1113
Central	192	564	756
Hill	376	50	426
Lanier	713	7	720
Murrah	180	864	1044
Provine	278	637	915
Wingfield	51	897	948
TOTAL	7537	8156	15693

TOTAL ELEMENTARY	19775
TOTAL SECONDARY	15693
GRAND TOTAL	35468

Appendix C

Projected Secondary Enrolment
Under HEW Plan A

School	*Grades*	*Junior High* *White*	*Negro*	*Building Capacity*
Whitten	7-8	370	165	868
Peeples	7-8	801	282	1286
Isable-Hill	9	501	190	Hill 200 Isabell 500
Blackburn	7-8-9	268	756	1458
Hardy	7-8	572	697	1278
Enochs	9	248	293	830
Bailey	7-8	692*	632*	1310
Rowan	9	285	281	996
Chastain	7-8	823	482	1234
Powell	9	509	379	1574
Callaway	7-8	456**	402**	550

*(W)942, (N)682, option from Calloway overflow 8th to Rowan.
**(W)206, (N)350, option.

	Senior High			
Hill	10	532	167	894
Wingfield	11-12	924	289	894
Provine	10-12	873	533	1180
Murrah	11-12	772	531	1180
Brinkley	10	875	762	1154
Callaway	11-12	851	759	448

Appendix D

Projected Secondary Enrollment
Under HEW Plan C

School	*Grades*	*White*	*Negro*	*Building Capacity*
Peeples-Whitten	7-8	1382	438	2154
Enochs	7-8	128	408	830
Hardy	7-8	549	587	1286
Bailey-Rowan	7-8	1243	983	2306
Chastain	7-8	884	546	1434
Hill-Isable	9-10	1022	401	1374
Blackburn	9-10	691	869	1458
Brinkley	9-10	645	531	1154
Powell	9-10	1085	708	1574
Wingfield	11-12	825	338	894
Provine	11-12	507	581	1180
Murrah	11-12	707	502	1180
Callaway	11-12	779	584	998

Appendix E

RACIAL COMPOSITION OF STUDENT BODIES
JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT

SCHOOLS	*Under HEW Plan B*	
JUNIOR HIGH:	*WHITE*	*NEGRO*
Whitten	370	165
Peeples	801	282
Isable-Hill	501	190

JUNIOR HIGH:	*WHITE*	*NEGRO*
Blackburn	268	756
Hardy	572	697
Enochs	248	293
Bailey	942	682
Rowan	285	281
Chastain	823	482
Powell	509	379
Callaway	206	350
Lanier	0	0
SENIOR HIGH:		
Brinkley	627	629
Callaway	853	441
Murrah	707	625
Provine	741	521
Hill	456	169
Wingfield	730	276
MAGNET HIGH SCHOOLS:		
Central	823	532
Lanier	734	339

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29226

DEREK JEROME SINGLETON, ET AL.,
Plaintiffs-Appellants,
versus

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(July 13, 1970)

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service

not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

COLEMAN, Circuit Judge, voted in favor of an en banc rehearing.

OPINION AND ORDER PROVIDING FOR UNITARY SCHOOL SYSTEM

Filed: Jun. 15, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DEREK JEROME SINGLETON, ET AL,
Plaintiffs,
CIVIL ACTION
versus No. 3379

JACKSON MUNICIPAL SEPARATE
SCHOOL DISTRICT, ET AL,
Defendants.

By decision of May 15, 1970, a panel of the Fifth Circuit Court of Appeals remanded the above styled case to the District Court with directions to formulate a new student assignment plan. The current plan, now rejected, was adopted by this Court on January 22, 1970, pursuant to a previous order of the Appellate Court directing the Jackson Municipal Separate School District to invoke the assistance of the Office of Education of the United States Department of Health, Education and Welfare, in preparing desegregation plans. As reflected in this Court's order of January 22, 1970, the school board agreed to the desegregation of faculty and staff, extra-curricula activities and other policies spelled out in an earlier Singleton decision of December 1, 1969. As requested, HEW filed a proposal for the desegrega-

tion of student bodies consisting of three alternative plans, A, B and C. The proposed assignment of elementary students, grades 1-6, was the same in all three plans, the assignments of secondary level students being alternatively treated in the various proposals. The school board offered modifications to the proposed HEW plans. After a hearing, this Court, as to the elementary level, adopted the HEW plan, essentially a zoning plan, with minor modifications requested by the school board, not all of whose suggestions were approved, and adopted the school board's proposals as to the secondary level, also a zoning plan. By successive mandates from the Supreme Court of the United States and the Appellate Court, this Court was directed to order the immediate implementation of this plan by February 1, 1970. It was so implemented and is currently in effect. Nonetheless, four months after its implementation, the Appellate Court has rejected the plan, finding in essence that the existence of a number of schools with segregated student bodies prevents the system from being a unitary one when there is a reasonable alternative plan that will result in a more nearly unitary system. With respect to the elementary level, this Court had before it no alternative proposal — only the HEW plans to which it made minor modifications, as noted above. Nonetheless, in response to the recent directions from the Appellate Court, whereby this Court was directed to call for new proposals for the elementary level from (1) plaintiffs, (2) the defendant school board, (3) HEW, and (4) a bi-racial committee, appointed in accordance with the mandate, said plans to be filed by June 1, 1970, in order that

this Court make its findings by June 15, 1970, only one plan was submitted.

ELEMENTARY SCHOOLS

HEW filed a new Plan A. The school board averred that it was unable to propose a plan, either educationally or practically feasible, which would attain more racial mixture than the present Court imposed plan, a plan the Board maintains "is working," and offered only one minor modification, to-wit, to pair Barr and Poindexter, which pairing would not prejudice the racial balance at either school. The bi-racial committee offered proposals which would eliminate total segregation in the six now all white schools, and would assign white students to what are now three predominately negro schools. Plaintiff-appellants delayed making any proposals until after examining the HEW plan, to which it then offered modifications for the sole purpose of effectuating more racial mixture. Department of Justice attorneys appeared neither on behalf of HEW nor as amicus curiae.

Dr. Larry Winecoff, head of a nine-man HEW team which formulated the plans of January and June 1970, again testified as plaintiffs' witness on behalf of the June plan. The currently proposed plan, like its predecessor, is a zone plan. Whereas the former plan established 37 zones for the 38 elementary schools, each housing grades 1-6, except for the pairing of Watkins and Green, and the cross-zoning of black students from Isable to Key and Lester (a proposal now sought by the bi-racial committee), the present plan proposes to close

three schools, Robertson, Martin and Barr, otherwise retaining basically the same zone lines of the January plan, but grouping 35 schools into ten clusters or areas, in some instances assigning non-contiguous areas to the parent cluster. The schools in each area would either retain grades 1-6, or, when paired, serve either grades 1-3 or grades 4-6, grades 1-2 or 3-6, or grades 1-4 or 5-6, thereby each area serving 1-6 grades within its boundaries.

A chart of the assignments follows:

School	*Capacity with Port.*	*Grades*	*White*	*Negro*	*Total*
AREA I					
1. Sykes	576	1-6	400	179	579
2. Lee	416	1-6	296	128	424
3. Baker	512	1-6	307	153	460
AREA II					
4. Marshall	576	1-4	432	0	432
5. Key	576	1-4	368	0	368
6. Lester	448	1-4	156	68	224
7. Isable	1120	5-6	467	607	1074
8. Reynolds	1056	1-4	0	1056	1056
AREA III					
9. Wilkins	576	1-4	373	116	489
10. Clausell	192	5-6	166	57	223
AREA IV					
11. Lake	615	1-3	307	329	636
12. Whitfield	480	1-3	127	369	496
13. Jones	1248	4-6	434	676	1110

School	Capacity with Port.	Grades	White	Negro	Total
AREA V					
14. George	192	1-6	108	83	191
15. Davis	352	1-6	52	303	355
16. Poindexter	192	1-6	82	118	200
17. Galloway	500	1-6	162	385	547
18. Brown	800	3-6	224	530	774
19. Power	416	1-2	122	267	389
AREA VI					
20. French	576	1-2	154	404	558
21. Johnson	1008	3-6	310	790	1110
AREA VII					
22. Raines	608	1-6	360	261	621
23. Bradley	384	1-6	203	174	377
24. Dawson	608	1-6	174	420	594
AREA VIII					
25. Morrison	544	1-4	0	549	549
26. Watkins	576	5-6	259	317	576
27. Green	608	1-4	518	95	613
AREA IX					
28. Smith	960	1-4	0	488	488
29. Walton	1120	1-4	0	638	638
30. Duling	384	5-6	171	244	415
31. Boyd	608	5-6	269	360	629
32. McWillie	640	1-4	517	42	559
33. Casey	480	1-4	362	10	372
AREA X					
34. Spann	576	1-6	497	47	544
35. McLeod	768	1-6	665	51	716

Area I. Contains Sykes, Lee and Baker Zones. All three schools will serve grades 1-6 in each zone, with 170 blacks to be transported from the Martin School Zone (closed) to Sykes; 128 blacks from Robertson and Martin Zones (closed) to Lee; and 153 blacks from Robertson (closed) to Baker.

Area II. Contains Marshall, Key, Lester, Isable, and Reynolds schools. Grades 1-4 to be paired into Marshall, Key, Lester or Reynolds Zones. Area grades 5-6 to attend Isable.

Area III. Clausell paired with Wilkins, Wilkins to serve area grades 1-4, and Clausell area grades 5-6.

Area IV. Lake, Whitfield and Jones are paired to serve this area: Lake, grades 1-3; Whitfield, grades 1-3 and Jones, grades 4-6.

Area V. Contains George, Davis, Poindexter, Galloway, Brown and Power schools. Grades 1-6 are zoned to George, Davis, Poindexter and Galloway, and Brown, grades 3-6, is paired with Power, grade 1-2. The Brown-Power Zone contains a non-contiguous area northeast of the Brown-Power schools.

Area VI. French to be paired with Johnson, French to serve grades 1-2 in the area, and Johnson grades 3-6 in the area.

Area VII. Contains Raines, Bradley and Dawson. Grades 1-6 are zoned to each school, with the Bradley Zone containing non-contiguous area northeast of the

Dawson Zone, some 8 to 10 miles from the Bradley school, and the Raines Zone containing a non-contiguous area several miles north of the Raines school.

Area VIII. Contains Morrison, Watkins and Green Schools, with Morrison, Grades 1-4 and Green, grades 1-4, paired with Watkins, grades 5-6.

Area IX. Contains Smith, Walton, Duling, Boyd, McWillie and Casey. Grades 1-4 are sub-zoned to Smith, Walton, McWillie and Casey. The McWillie sub-zone includes a non-contiguous area to the north. Duling and Boyd are to serve grades 5-6 each, but with no boundary lines shown as to how they are to be paired with the 1-4 schools.

Area X. Contains two schools, Spann and McLeod, each zoned for 1-6 grades, and with McLeod containing a non-contiguous area to the northwest.

Even under this elaborate plan, two schools, Marshall and Key, remain totally white, two, McWillie and Casey, remain with token black attendance, and four schools, Reynolds, Morrison, Smith and Walton remain totally black. Plaintiffs' proposals are geared to altering the racial mixture of the above schools by assigning 480 blacks from Reynolds, 200 to Marshall, 200 to Key and 80 to Lester in Area II; in Area VIII, assigning 200 whites from Green to Morrison, and 200 blacks from Morrison to Green; and in Area IX assigning 100 whites from Casey to Smith, 200 whites from McWillie to Walton, 100 blacks from Smith to Casey, and 200 blacks from Walton to McWillie.

Dr. Winecoff testified that the January HEW plan was prepared on the premise that transportation of students is limited by state law. The plan itself stated: "Pupils living outside the city limits may be transported to an attendance center within the city or without the city. Those residing within the city limits may be transported to an attendance center outside the city limits. Special legislation provides for transportation of special education pupils at public (state) expense." Under state laws, Section 6336.01, et seq., Mississippi Code of 1942, the Jackson school board has furnished transportation to students residing outside the municipal corporate limits, but within the school district, who attend schools within the district, referred to hereinafter as inter-city busing. Historically, no transportation has been furnished to students living within the Jackson system, referred to as intra-city busing, except special education students. Prior to January 1970, a total of 2343 students were transported. Under the January HEW Plan for inter-city transportation. Under the January HEW Plan templated that 1224 elementary students, and 2343 junior high and high school students, for a total of 3567 would be eligible. No figures were shown as to the number of children now being transported. Under the proposed plan for elementary students, HEW estimates that 1055 students will be eligible for inter-city transportation, in addition to those now eligible, at a cost of $43.00 per student for a total cost of $45,365.00, and which will require 14 busses. It is presumed that this amount would be reimbursed to the school system from state funds. For intra-city transportation, at the elementary level only, and for students living one mile or more from the school to which they are assigned,

HEW estimates that a total of 3,232 students would require transportation. At $30.00 per student, the cost would be $96,960.00 and 28 busses would be needed. For students living 1 1/2 - 2 miles from school, the cost at $30.00 per student would be $47,730.00, and 13 busses would be required. None of these figures include the purchase price of busses. HEW notes that these costs for intra-city transportation are in addition to the cost of present inter-city transportation. As an offset against the maximum cost of intra-city transportation, HEW estimates a savings of $79,890.00, the personnel and operations cost of the three schools HEW plans to close.

Dr. Winecoff testified that the June plan, unlike the January plan, is based on the assumption that the school board has authority to transport students within the municipal limits of Jackson. He conceded that if the board has no such authority then he would not recommend the new proposal as it would be useless and add nothing to the plan now in operation which he unequivocably further stated is a unitary plan in the absence of intra-city transportation.

The School Board agrees that the statutory constitutionality of bussing students is not under attack. It has steadfastly contended that, as an agency of the state, it has no inherent or legislative authority to expend funds for intra-city transportation. In this the board is upheld by a recent opinion of the attorney general of the State of Mississippi, a copy being on file herein.

The school board does not support the proposed HEW plan. Assuming the board acquired authority to enter into a massive intra-city transportation system, the

HEW plan does not eradicate the existence of some totally or near totally segregated schools to which the Appellate Court made objection. The school board through its witnesses, including Mr. John Martin, superintendent of schools and members of his staff in charge of statistics and transportation, contend that the HEW proposal fails in its purpose and is administratively, educationally and economically unsound. By way of illustration, out of 35 schools, 11 would contain grades 1 through 4; 5 schools would contain grades 5-6; 2 schools would have grades 1-3; one school would contain grades 4-6, 2 schools would have grades 1-2; 2 schools would have grades 3-6; and 12 schools which would contain grades 1-6, whereas the normal pattern is for grades 1-6. The scattering of grades, and pairing of grades throughout the areas would thus present extensive curriculum and staffing problems, would destroy the concept of neighborhood schools, impair student morale, and alienate parents and the community. Administratively, the board contends the proposed transportation is artificially contrived and poses insurmountable administrative problems exclusive of costs. The plan proposes that children are to be picked up at unsupervised gathering places, in whatever the weather, with precise bus schedules, impossible to keep under normal city traffic, and that the volume of routes and busses required under minimum conditions would necessitate the staggering of school hours.

In contrast to the number of additional busses required and costs projected by HEW, the board offered a comprehensive analysis of the number, length and time scheduling of routes and costs required under the HEW proposal and as added to by plaintiffs' proposals.

These analyses are exhibits hereto. Other than the surmise of Dr. Winecoff, admittedly not a transportation expert, that some routes could be consolidated, or that future enrollment may not require as many busses as present enrollment requires, the Court finds these analyses are realistic. On cross-examination Dr. Winecoff admitted that he did not question the accuracy of the board's analysis. According to this evidence inter-city transportation for 1055 students under the June HEW plan at the elementary level would require 16 new busses at a cost of $6,600.00 each, and an operational expense of $43.00 per student for a total of $150,-965.00. Intra-city transportation, with each new route analyzed, timed and measured by members of the school staff, shows in Area I that a minimum of five busses would be needed to transport 460 students over routes ranging from 6.4 to 7.5 miles. In Area II, nine busses would be required to move 552 students over routes varying from 3 to 5 miles. In Area III, three busses are necessary to move 200 students over routes from 1.5 to 1.8 miles. In Area IV, six busses are required to move 600 students over routes from 3.6 miles to 3.9 miles. In Area V, containing six schools, four busses, making double trips, would be required to move 520 students in criss-cross fashion throughout the area. In Area VI, six busses are required to move 540 students over routes from 3.6 miles to 4.2. As to Areas VII and VIII, most of the students involved live outside the city and are already receiving inter-city transportation. Destinations only would have to be changed. In Area IX, using only two busses, as assumed by HEW to transport 220 Smith students to Duling, a distance of 2.9 miles, would leave 110 students unsupervised while waiting for busses unloading at Duling to return for

them. In this same area three busses would be required to transfer 300 pupils from Walton to Boyd, 2.4 miles, and two b sses, each making two trips, to carry 240 pupils from Duling to Casey and Casey to Duling, a distance of 3.2 miles one way and 2.9 miles the other way. Also in this same area, two busses are required to interchange 120 students between McWillie and Boyd for a distance of 1.3 miles one way and 1.5 miles the other way. In Area X, as in Areas VII and VIII, these students are included in inter-city transportation. From its analyses, the school board has determined that 49 new busses will be required at a cost of $6,600.00 each for $323,400.00 Costs of operation, including drivers salaries, for 1969-1970 through April 30, on its presently owned busses (44) transporting 2139 students, totals $81,617.15. Using these costs to calculate the cost per pupil ($39.80 in 1969-70) ($43.24 in 1968-69), the cost of transporting 4,012 additional elementary students in intra-city movement, as proposed by HEW, would be $164,492.00. This added to the purchase price of busses calls for an outlay of $487,892.00. Adding to this the $150,965.00 for inter-city transportation, the HEW proposals would require a total cost to the district's budget of $638,857.00. Using a similar analysis for plaintiffs' proposals, the board computes that transporting an additional 780 students would require a minimum of 17 new busses at a cost of $112,200.00, and operational costs, on the basis of $43.24 per pupil, would add $76,-967.00, for a total of $189,167.00, or a grand total under HEW and plaintiffs' proposals of $828,024.00. The analysis notes that this figure does not reflect such additional costs as may be incurred from a majority to minority transfer policy.

According to the school district's 1969-70 budget, it has an operations income budget of $18,610,210.00. The current budgeted expense of transportation is the sum of $114,730.00 which includes student transportation by busses as well as by contracted services and public carriers; it also includes costs allocated to the transportation of special education pupils. The total amount budgeted for student transportation constitutes 0.62% of the total budget. The total of additional transportation required by the HEW plan and plaintiffs' proposals would increase costs of transportation to over 5% of the entire budget, an amount not heretofore allocated in the budget nor authorized. Plaintiffs, however, point out that the budget income is derived from sources which include tax levies totaling 23.55 mills, whereas the statutory ceiling is 25 mills, leaving available a levy of 1.55 mills, and that this levy on the value of property assessments in the municipality would result in approximately $800,000.00 more income. Plaintiffs also point to an item in the 1969-70 budget showing a surplus of funds in the sum of $799,039.00, a sum the board normally keeps on hand for unforseen emergencies. Assuming that such funds from either of the above sources may be available in future budgets for transportation, they are not available nor authorized for a plan which is to be adopted now. Added to all of the above is the report by the school board, after contacting bus dealers, additional new busses in the amount required are not available until after October, 1970. This evidence is uncontradicted. This Court is not aware of any authority approving extensive bussing of students to achieve a unitary system. *Kemp v. Beasley*, 8 Cir., 1970, (No. 19,782, March 17, 1970.)

In summarizing all the evidence before it, the Court finds that the proposals of HEW as added to by plaintiffs are not educationally, administratively, economically or practically feasible. Certainly, the additional costs necessary to put the plan into effect would be wholly excessive and totally unreasonable. See Swann v. Charlotte-Mecklenburg Board of Education, et al, 4th Circ. 1970, (Nos. 14517 and 14518, May 26, 1970.) Should this Court entertain the adoption of these proposals, they are not implementable under the current deadline.

The bi-racial committee appointed by this Court met as often as time permitted, keeping minutes of its deliberations, sealed by this Court and made a part of the record. The committee's proposals state on the face thereof that its plan does not provide for the complete desegregation of all of the schools but represents the maximum amount of desegregation upon which the committee could agree. This committee accepted the challenge of desegregating the totally or almost wholly segregated schools the Appellate Court found objectionable, and unerringly directed its efforts toward that end within the framework of available transportation. The committee proposes to assign black students in the present McWillie, Spann, McLeod, Power and Duling Zones and divide them more or less equally among McWillie, McLeod, Spann and Casey; to assign black students in the present French and Raines zones and divide them more or less equally among French, Raines and Lake; to create five more or less equal sub-zones in the Isable zone and assign grades 5-6 in these sub-zones to Lester, Key, Marshall, Sykes and Lee; to assign enough whites (that are presently eligible for transportation) out of Green-Watkins area to

fill to capacity Bradley, Dawson, and Morrison; and, finally, add to the Walton zone that part of the Boyd zone which is west of the railroad, south of Northside Drive and north of creek.

On the basis of the latest enrollment figures, May 8, 1970, corrected as of May 21, 1970, and incorporating the committee's proposed assignment, the projected enrollment in the Jackson Elementary Schools is as follows:

	Grades 1-6		*Special Education*		*Sub-Total*		*Total*
	Negro	*Other*	*Negro*	*Other*	*Negro*	*Other*	*Combined*
Baker	3	293	1	30	4	323	327
Barr	43	65	0	10	43	75	118
Boyd	171	340	0	0	171	340	511
Bradley	341	92	0	0	341	92	433
Brown	658	0	0	0	658	0	658
Casey	30	451	0	0	30	451	481
Clausel	157	6	44	0	201	6	207
Davis	293	46	10	6	303	52	355
Dawson	420	109	0	0	420	109	529
Duling	122	118	0	0	122	118	240
French	142	318	0	0	142	318	460
Galloway	367	133	18	29	385	162	547
George	83	91	0	0	83	91	174
Green	123	484	0	0	123	484	607
Isable	517	0	0	0	517	0	517
Johnson	832	50	30	0	862	50	912
Jones	1205	10	29	0	1234	10	1244
Key	50	480	0	0	50	480	530
Lake	50	615	0	0	50	615	665
Lee	51	371	0	0	51	371	422

	Grades 1-6		Special Education		Sub-Total		Total
	Negro	Other	Negro	Other	Negro	Other	Combined
Lester	138	228	0	0	138	228	366
Marshall	55	573	0	0	55	573	628
Martin	206	17	0	0	206	17	223
McLeod	51	665	0	0	51	665	716
McWillie	38	495	0	0	38	495	533
Morrison	461	78	11	0	472	78	550
Poindexter	81	40	10	52	91	92	183
Power	39	366	0	0	39	366	405
Raines	81	494	0	0	81	494	575
Reynolds	982	0	0	0	982	0	982
Robertson	320	0	0	0	320	0	320
Smith	1008	0	14	0	1022	0	1022
Spann	47	497	0	0	47	497	544
Sykes	51	452	0	0	51	452	503
Walton	798	80	47	0	845	80	925
Watkins	125	244	4	26	129	270	399
Whitfield	159	230	0	0	159	230	389
Wilkins	16	497	0	0	16	497	513
Elementary Total	10,314	9028	218	153	10,532	9181	19,713

These proposals eliminate total segregation from all of the white schools, improve the degree of mixture in most, and leave five totally black schools all in the heavily congested black community.[1] Despite this last, these proposals will result in more integrated schools than any proposed plan before this Court. It is additionally noted that where HEW assignments would have overtaxed the capacity of 14 schools, with two addition-

[1]See Ellis v. Board of Public Instruction of Orange County, Fla., 5th Cir. 1970 (No. 29,124, Feb. 17, 1970)

ally over-taxed under plaintiffs' proposals, under the present plan as modified by the committee and the Court, the over-assignments are reduced considerably. With the addition of the majority to minority transfer policy, and the following assignment changes offered by the Court, additional unitary steps will have been taken.

Under the present plan and unchanged by the bi-racial committee proposals, only six white students are assigned to Clausell with 157 black students. This resulted from the use by HEW in January of the geographical hazard of Highway 80. As the Appellate Court rejected consideration of this factor, HEW in its June plan proposed the pairing of Clausell and Wilkins which comprise the area designated by HEW as Area III. Under the Appellate Court's ruling, there is no reasonable objection now why these two schools should not be paired into one zone, Wilkins serving grades 1-4, and Clausell serving grades 5-6. Under the school board's transportation analysis, minimum transportation would be required, 1.5 miles one way and 1.8 miles the other. The racial mixture would be improved to the extent of 373 whites and 116 blacks at Wilkins, and 166 whites and 57 blacks at Clausell. For the above reasons this Court is of the opinion, and finds that this modification should be made. With the above modifications in mind, only two schools, Martin and Jones, remain where white attendance is of a token nature. This is not due to any natural or man made barriers, factors discarded by the Appellate Court, nor to gerrymandering which the Appellate Court found did not exist, nor the failure of this Court to assign more whites to these schools.

The school board has requested the consolidation of Barr, the smallest school at the elementary level, presently with a total attendance of 118, with Poindexter, as an administrative accommodation. HEW had likewise proposed the closing of this school. As the degree of integration at Poindexter will remain approximately the same, the Court concurs with this proposal.

Accordingly, the Court, as to the elementary level of the Jackson Municipal schools, directs the adoption of the currently court imposed student assignment plan, as modified by the bi-racial committee, and with the following two additional modifications:

1. Clausell and Wilkins are to be paired, Wilkins to serve grades 1-4 within the boundary limits of the consolidated zones of Clausell and Wilkins, and Clausell to serve grades 5-6 within the same boundary limits.

2. Barr is to be closed, with all students from this zone to be assigned to Poindexter.

JUNIOR HIGH AND HIGH SCHOOLS

As to the junior high and senior high schools at the secondary level, the Appellate Court directed this Court to adopt one of the presently available HEW plans which were proposed at the January 1970 hearing of this Court. The school board endorses none, expressing the view that the present plan, although problems do continue to exist, has the general support of the community and is working as a result of a total community effort.

Plans "A" and "B" are the same for the junior high level, and retain generally the present grade structure of grades 7-9 for junior high and grades 9-12 for high school. They are essentially zoning plans. All three plans contemplate the same use of two schools as magnet schools for comprehensive vocational-technical programs. Plan "C" completely restructures the secondary level into a 2-2-2 system. The board particularly objects to Plan "C" because of the administrative problems it would provoke, i.e., the re-organization of physical facilities and curricula, re-assignments of faculty and re-location of large numbers of portables, including some of those recently re-located to meet the demands of the January assignments by this Court. The re-location of portables involves a minimum expense of $750.00 each.

Dr. Winecoff expressed a preference for Plan "C", solely because he prefers the grade 2-2-2 structure. However, he recognized that the Jackson schools had historically used a 3-grade structure on the secondary level, and that the problems referred to above would be attendant if "C" were adopted. He stated that all three plans are unitary; that due to changes in enrollment and relocation of portables since the plans were worked out that all three would have to be modified to some extent, Plan "A" requiring the least modifications; and that under present enrollment, Lanier, one of the target schools contemplated in all three plans, would have to be used as a regular school. He admitted that in Plan "A", the proposed assignment of 691 ninth grade students to the Isable-Hill complex, together with HEW's proposed current assignment of 1074 elementary students to Isable would greatly over-

tax Isable whose total capacity is 1120. The Court recognized this problem at the January hearing in granting the school board's request to alter this impossible assignment. Present attendance of elementary students at Isable is 763. Under the bi-racial committee's proposal, approved above, to reduce the number of elementary students at Isable to 517, this problem is reduced to one of a minimal boundary change or relocation of portables. The Court therefore finds Plan "A" the most feasible of the three, requiring the least modifications, due to changes which have occurred since January 1970, and which does not lessen the degree of racial mixture from either Plan "B" or "C".

As pointed out earlier herein, the school board has heretofore adopted all of the desegregation of faculty and staff, transportation, new construction, and majority to minority transfer policies required by Singleton decision of December 1, 1969. The Board is directed to do so again for all succeeding school terms, particularly as to the transfer policy which was omitted from this Court's order of January 22, 1970.

ORDER

It is therefore ordered that the defendant Jackson Municipal Separate School District adopt the desegregation of faculty and staff, extra-curricula activities and other policies detailed in the earlier Singleton decision of December 1, 1969, *Singleton v. Jackson Municipal Separate School District*, 419 F. 2d 1211, specifically including the majority to minority transfer policy.

As to the student assignment plan for elementary schools, said school district is hereby directed to adopt the present Court plan approved in the January 22, 1970 order of this Court, as modified by the bi-racial committee proposals, and as reflected in projected enrollment appearing on page 13 herein together with these added modifications:

1. Clausell and Wilkins are paired, Wilkins to serve grades 1-4 within the boundary limits of both Clausell and Wilkins zones, and Clausell to serve grades 5-6 in said zones.

2. Barr is closed, with all students from Barr assigned to Poindexter.

As to the student assignment plan for the junior high and high schools at the secondary level, said school board is directed to adopt Plan "A" of the presently available HEW plans, consisting of the zones shown therein, described by metes and bounds and as reflected on maps, and the assignment of students which is as follows:

JUNIOR HIGH

Zone	*Name Of School*	*Grades*	*STUDENTS*		
			W	*N*	*T*
I	Whitten	7-8	370	165	535
I	Peeples	7-8	801	282	1083
I	Isable-Hill	9	501	190	691
II	Blackburn	7-8-9	268	756	1024
III	Hardy	7-8	572	697	1269
III	Enochs	9	248	293	541
IV	Bailey	7-8	942	682	*

Zone	Name Of School	Grades	STUDENTS W	N	T	
			692	632	1324	
IV	Rowan	9	285	281	566	
V	Chastain	7-8	823	482	1305	
V	Powell	9	509	379	888	
V	Calla way	7-8	206	350	556	-option
			456	402	858	

*Option from Calloway overflow 8th to Rowan

TOTALS	5525	4559	10084	

HIGH SCHOOLS

Zone	Name Of School	Grades	STUDENTS W	N	T
I	Hill	10	532	167	699*
I	Wingfield	11-12	924	289	1213*
II	Provine	10-12	873	533	1406*
III	Murrah	11-12	772	531	1303*
III					
IV	Brinkley	10	875	762	1637*
IV	Callaway	11-12	851	759	1610*
	TOTALS		4827	3041	7868*

*Twenty per cent of these students will go to the comprehensive school (Lanier and Central) as described under *Magnet Schools for Comprehensive Vocational-Technical Programs.*

MAGNET SCHOOLS

Two schools — Lanier and Central — are to serve as magnet schools drawing from the entire district. They will house specialized vocational and technical programs. Any student, wherever residing in the dis-

trict may attend either school for the purpose of enrolling in a specialized program.

It is recognized that the school board should have flexibility in the locating and re-locating of portable classrooms and in fixing zone boundaries in order to adequately house students as assigned above. However, in no instance, shall zone or sub-zone lines be established or changed except to the extent such changes will not tend to reestablish a dual school system.

The presently constituted bi-racial committee shall continue to function, with the chairman alternating between races annually from the date of the original appointment, May 12, 1970, and this committee shall have the duty of recommending to the school board ways to attain and maintain a unitary system.

The school board and the bi-racial committee are to make bi-annual reports — on December 1 and April 1 — to this Court on the maintenance of a unitary system, such reports to include the following information:

I.

(a) The number of students by race enrolled in the school district;

(b) The number of students by race enrolled in each school of the district;

(c) The number of students by race enrolled in each classroom in each of the schools in the district.

II.

(a) The number of full time teachers by race in the district;

(b) The number of full time teachers by race in each school in the district;

(c) The number of part time teachers by race in the district;

(d) The number of part time teachers by race in each school in the district.

III.

Describe the request and the results which have accrued, by race, under the majority to the minority transfer provision which was a part of this court's order of November 7, 1969.

IV.

State the number of inter-district transfers granted since this court's order of November 7, 1969, the race of the students who were granted such transfers, and the school district to which the transfers were allowed.

V.

State whether the transportation system, if any, in the district is desegregated to the extent that negro and white students are transported daily on the same buses.

VI.

State whether all facilities such as gymnasiums, auditoriums, and cafeterias are being operated on a desegregated basis.

VII.

Give brief description of any present or proposed construction or expansion of facilities.

VIII.

(a) State whether the school board has sold or abandoned any school facility, equpiment, or supplies having a total value of more than $500.00 since this court's order of November 7, 1969.

IX.

(a) Give a brief description of the work of the biracial committee since the last report.

(b) Copies of all recommendations made by the biracial committee.

The school board is hereby directed to make the above student assignments for the 1970-71 school year on or before July 1, 1970, notifying parents of these assignments.

The Clerk of this Court is directed to mail a copy of this plan and order to all parties of record.

SO ORDERED this the 15th day of June, 1970.

(Signed) DAN M. RUSSELL, JR.
UNITED STATES
DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29226

DEREK JEROME SINGLETON, ET AL.,
Plaintiffs-Appellants,
versus

JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(August 12, 1970)

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

PER CURIAM: Here we review the District Court's order imposing a plan for a unitary school system for the elementary grades in the Jackson Municipal Separate School System. This plan was adopted pursuant to our mandate in *Singleton IV, Singleton v. Jackson*

Municipal Separate School Dist., 5 Cir., 1970, ____ F.2d ____ [No. 29226, May 5, 1970].[1]

That mandate required the District Court to reconsider the plan (adopted in January 1970) for the system at the elementary level. The District Court appointed a Bi-Racial Committee also pursuant to that mandate. And that Committee[2] and HEW proposed new plans. The School Board offered no new plan, but did support the Bi-Racial Committee's proposal. Plaintiffs did not propose a new plan, but did suggest substantial modifications to the January 1970 plan put forward by HEW.[3]

Under the stringent time limitations imposed by *Alexander v. Holmes County School System*, 1969, ____ U.S. ____, ____ S.Ct. ____, 24 L.Ed.2d 19; *Singleton III*, *Singleton v. Jackson Municipal Separate School Sys-*

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[1]With the intervening order for the secondary level of July , 1970, Singleton v. Jackson Municipal School District, 5 Cir., 1970, ____ F.2d ____ [No. 29226, July , 1970, as *Singleton V*, the current one becomes *Singleton VI*].

[2]The Bi-Racial Committee is composed of 12 persons, 6 white, who were suggested by the School Board, and 6 Negro, who were suggested by Plaintiffs. Its proposal was a result of extensive effort by people with little expertise in this field, practically no assistance for staff, and no funds. Its work did, however, represent a very commendable effort and a contribution to this community problem.

This experience suggests that for the problems posed by out reversal and remand the District Court should enlist the cooperation of both HEW and the School Board in supplying one or more liaison representatives to the Committee. With this professional staff-like assistance this will enable it to be directly involved in the essential exploratory activities leading to recommendations to the District Court.

[3]Hereafter all references to the "HEW Plan" will be to the June HEW unless otherwise specifically stated.

tem, 5 Cir., 1970, 419 F.2d 1211, and *Singleton IV*, the District Court held an evidentiary hearing[4] on June 8, 1970, and on June 15, 1970 it ordered the plan pro-

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[4]On the hearing the District Court did not allow the Plaintiffs to make any testimonial inquiry into the considerations taken into account in the preparation of the Bi-Racial Committee's plan. It is not necessary for us to categorize this as "error" especially since under our mandated time schedules the hearings themselves often must be compressed. But in the full factual development of justifications required on remand, we thing the proposals and any modifications should be explored as fully as needed to determine strengths and weaknesses, etc.

[5]The results under this plan are:

			Under District Court Approved Plan		
	Schools		*Negro*	*White*	*Percentage**
1.	Baker		4	323	99%
2.	Boyd		171	340	67%
3.	Bradley		341	92***	79%
4.	Brown		658	0	100%
5.	Casey		30	451	94%
6.	Clausell		57	166	75%
7.	Davis		303	52	85%
8.	Dawson		420	109***	79%
9.	Duling		122	118	51%
10.	French		142	318	69%
11.	Galloway		385	162	70%
12.	George		83	91	52%
13.	Green		123	484	80%
14.	Isable	1-4**	517	0	100%
15.	Johnson		862	50	94%
16.	Jones		1,234	10	99%
17.	Key		50**	480	90%
18.	Lake		50	615	92%
19.	Lee		51**	371	88%
20.	Lester		138**	228	62%
21.	McLeod		51	665	93%
22.	McWillie		38	495	93%
23.	Marshall		55**	573	91%
23a.	Martin		206	17	92%
24.	Morrison		472	78	86%

posed by the Bi-Racial Committee[5] to be implemented.[6]

We find the results to be unacceptable. Under this plan approximately 70% of the Negro elementary students will be in all (or substantially all) Negro elementary schools. In fact the 70% figure is an understatement for Bradley and Dawson are not included in the schools that are substantially all Negro. The integration in those schools is confined to only two grades. See note 5, *supra*, items 3 and 8. We have to

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25.	Poindexter	134	167	55%
26.	Power	39	366	90%
27.	Raines	81	494	86%
28.	Reynolds	982	0	100%
28a.	Robertson	320	0	100%
29.	Smith	1,022	0	100%
30.	Spann	47	497	91%
31.	Sykes	51**	452	90%
32.	Walton	845	80	91%
33.	Watkins	129	270	68%
34.	Whitfield	159	230	59%
35.	Wilkins	116	373	76%
	TOTAL	10,488	9,217	

*The percentage figures here and elsewhere reflect the [proportion that the] children of the majority race bear to the total student enrollment. Percentages are listed here strictly as informational aids. We expressly disclaim any intimation that racial balance is the standard by which we determine the acceptability of various desegregation plans.

**This plan provides for the reassignment of blacks attending Isable 5 and 6, "more or less" equally among the formerly white Lester, Key, Marshall, Sykes and Lee Schools. Therefore the desegregation reflected in those formerly white schools is limited to grades 5 and 6 only.

***Whites assigned to these schools were assigned to Watkins under previous court order; and since Watkins serves grades 5-6 only, these grades are integrated in grades 5-6 only.

[6]The District did modify the Bi-Racial Committee's plan slightly by pairing Clausell and Wilkins Schools and closing Barr School and assigned those students to Poindexter.

be particularly sensitive to this because the zones from some substantially segregated secondary schools cover the same areas as are covered by all Negro elementary school zones. And some students will likely have an education in predominately Negro schools throughout their school life. This is especially true for those students attending Blackburn Junior High and Lanier High School. See charts in *Singleton V. Singleton IV: Davis v. Board of School Commissioners of Mobile County*, 5 Cir., 1970, ____ F.2d ____ [No. 29332, June 8, 1970]; *Mannings v. Hillsborough County*, 5 Cir., 1970, ____ F.2d ____ [No. 28643, May 11, 1970]; *Bradley v. Pinellas County*, 5 Cir., 1970, ____ F.2d ____ [No. 28639, July , 1970].

The HEW plan[7] was a substantial improvement over

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[7]The results under the HEW Plan are:*

			Under HEW Plan		
	Schools	*Grades*	*Negro*	*White*	*Percentage***
1.	Baker	1-6	153	307	67%
2.	Boyd	5-6	360	269	57%
3.	Bradley	1-6	174	203	54%
4.	Brown	3-6	530	244	68%
5.	Casey	1-4	10	362	97%
6.	Clausell	5-6	57	166	75%
7.	Davis	1-6	303	52	85%
8.	Dawson	1-6	420	174	75%
9.	Duling	5-6	244	171	59%
10.	French	1-2	404	154	72%
11.	Galloway	1-6	385	162	70%
12.	George	1-6	83	103	57%
13.	Green	1-4	95	518	84%
14.	Isable	5-6	607	467	57%
15.	Johnson	3-6	790	310	72%
16.	Jones	4-6	676	434	61%
17.	Key	1-4	0	368	100%
18.	Lake	1-3	329	307	52%
19.	Lee	1-6	128	296	70%

the plan approved by the District Court. It reduced the number of all Negro schools from 9 to 4 and the number of Negroes in which they constituted 95% or more of the student body to 2,731. Plaintiffs' modifications[8] of the HEW plan were an even greater improvement

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20.	Lester	1-4	68	156	70%
21.	McLeod	1-6	51	665	93%
22.	McWillie	1-4	42	517	92%
23.	Marshall	1-4	0	432	100%
24.	Morrison	1-4	549	0	100%
25.	Poindexter	1-6	118	82	59%
26.	Power	1-2	267	122	68%
27.	Raines	1-6	261	360	58%
28.	Reynolds	1-4	1,056	0	100%
29.	Smith	1-4	488	0	100%
30.	Spann	1-6	47	497	91%
31.	Sykes	1-6	179	400	69%
32.	Walton	1-4	638	0	100%
33.	Watkins	5-6	317	259	55%
34.	Whitfield	1-3	369	127	74%
35.	Wilkins	1-4	116	373	76%
			10,314	9,028	
	Special Ed.		218	153	
	TOTAL		10,532	9,181	

*Under this plan Barr, Robertson, and Martin would be closed.
**For use of percentages see note 5* *supra.*

[8] *HEW Plan With Modifications as Proposed by Plaintiffs**

NAME OF SCHOOL	*NEGRO*	*WHITE*	*%* **
I - All-Negro as of May 8, 1970			
1. Brown	530	244	68%
2. Isable	607	467	57%
3. *Morrison*	349	200	64%
4. *Reynolds*	576	300	66%
5. *Robertson*		CLOSED	
6. *Smith*	388	100	80%
7. *Walton*	438	200	69%

NAME OF SCHOOL	NEGRO	WHITE	% **
II - All-white as of May 8, 1970			
1. *Casey*	110	262	70%
2. *Key*	200	218	52%
3. Lake	329	307	52%
4. Lee	128	296	70%
5. *Marshall*	200	282	59%
6. Sykes	179	400	69%
III - Overwhelmingly white or Negro as of May 8, 1970			
1. Baker	153	307	67%
2. Bradley	174	203	54%
3. Clausell	57	166	75%
4. Dawson	420	174	75%
5. Johnson	790	310	72%
6. Jones	676	434	61%
7. Martin	CLOSED		
8. McLeod	51	665	93%
9. Power	267	122	68%
10. Spann	47	497	91%
11. Wilkins	116	373	76%
IV - Integrated as of May 8, 1970			
1. Barr	CLOSED		
2. Boyd	360	269	57%
3. Davis	303	52	85%
4. Duling	244	171	59%
5. French	404	154	72%
6. Galloway	385	162	70%
7. George	83	103	57%
8. *Green*	295	318	52%
9. *Lester*	148	156	51%
10. Poindexter	118	82	59%
11. Raines	261	360	58%
12. Watkins	317	259	55%
13. Whitfield	369	127	74%
14. *McWillie*	242	317	58%

*Only the italicized schools are affected by Plaintiffs' modifications. And all grade structures and zone boundaries are identical to those of the HEW plan.

**For use of percentages see note 5* *supra.*

There were to be no all Negro schools under that plan.

Both of these plans are based on a type of zoning that divides the District into large Areas, 10 in both plans, and then establishes a separate grade structure in the Area. For example, under the HEW plan, Area II, which is about 4 miles across, contains four schools in which grades 1-4 are presented and one large school in which grades 5-6 are presented. (See note 5, lines 14, 17, 18, 20, 23, *supra*). There was much discussion in the briefs that under this type of "clustering" it will be necessary for the School District to provide intra-city transportation for the plans to be effective. But we do not reach this since the changes we mandate persuade us that there is a variety of ways to improve the result.

We repeat that the result below is not acceptable. When making this determination in many recent cases, we have often specified the full form that the desegregation plan is to take. However we do not believe this is the wise course here since the record is inadequate. Consequently, a remand will be required. But meantime something must be done now. We cannot accept the proposition that over 70% of the Negro elementary students are to remain in substantially all Negro schools during the time the case undergoes more complete exploration. Consequently, pending the remand hearing and order of the District Court, discussed next, the School District is to operate under the plan approved below by the order of June 15, 1970, but with the following modifications:

(i) Brown is to be paired with Power.

(ii) Boyd is to be paired with Walton.

(iii) George is to be paired with Martin.

(iv) Robertson is to be paired with Poindexter.

(v) Lester is to be paired with Isable.

(vi) Watkins, Morrison, and Smith are to be grouped.[9]

(vii) The School District shall have the option of pairing:

(a) Jones with Lake or

(b) Johnson with Lake.

By these pairings and clusterings the percentage of Negroes in substantially all Negro schools will be reduced from over 70% to about 20%.[10] We must reem-

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[9]

Schools		*N*	*W*
(i)	(Power	39	366
	(Brown	658	0
(ii)	(Boyd	171	340
	(Walton	845	80
(iii)	(George	83	91
	(Martin	206	17
(iv)	(Robertson	320	0
	(Poindexter	134	167
(v)	(Lester	138	228
	(Isable	517	0
(vi)	(Watkins	129	270
	(Morrison	472	78
	(Smith	1022	0
vii(a)	(Jones	1234	10
	(Lake	50	615
vii(b)	(Johnson	862	50
	(Lake	50	615

[10]The final number in the paired schools will vary depending on the option under (vii) (a) or (b), *supra:*

	Jones-Lake			*Johnson-Lake*	
	N	*W*		*N*	*W*
(i) - (vi)	4754	1637		4754	1637
vii(a)	1284	625	vii(b)	912	665
TOTAL	6038	2262		5666	2302

phasize that these mandated modifications are an interim requirement and are not "frozen". The District Court is to begin a hearing not later than September 25, 1970. The hearing and order will canvass the whole elementary system with whatever changes are needed such as appropriate or required pairing, grouping, clustering, grade restructuring, and all other factors called for by our decisions and those of the Supreme Court. It will, of course, prescribe the time the changes are to become effective which must be at a time not later than January 1971 representing a midyear date regardless of formal terms or semesters. Likewise, all of the provisions of Part III, Singleton will apply as to appeals, record, briefs, etc.

Of course, the changes that will come as a result of the modifications we now specify and from the November order now called for will cause midyear disruptions, pupil reassignments and the like. But on balance, this is less costly than a continued loss of rights of a large number of students.

MODIFIED AND REMANDED.